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Vol. III

TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1947

No. 10

SCHINE CHAIN THEATRES, INC., ET AL.,
APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK

FILED OCTOBER 4, 1948.

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The next letter is Plaintiff's Exhibit 776, on the stationery of Metro-Goldwyn-Mayer Pictures, signed "R. W. Maw, Resident Manager," dated August 16th, 1938, to Mr. Chester Fenyvessy.

"Dear Chester: On my nest visit to Rochester, I will discuss the contents of your letter dated August 3rd personally with you, relative to the Schine clearance over the Madison and Monroe Theatres.

Kindest personal regards.

[fol. 2402] Sincerely, (Signed) R. W. Maw, Resident Manager."

Mr. McClennen: If your Honor please, that ends the letters and ends this group of letters. Now, then, you have heard the contents of them, we move that Mr. Fenyvessy's letters that have been read in this group be excluded as merely self-serving arguments, not at all admissible against the defendants. He is not an alleged co-conspirator and what he says we submit is not admissible in this way at all against us.

The Court: Denied.

By Mr. Clagett:

Q. Mr. Fenyvessy, also, do you recall, or did you have any conversation with Mr. R. W. Maw, some time after August 16th, 1938?

A. Yes, sir.

Q. Was Mr. Maw then—what was Mr. Maw's position at that time?

A. He was very cordial, but he could not give me anything.

The Court: What was his position?

Q. What was his position with the company?

[fol. 2403] A. Oh, his position with the Company, he was the Exchange Manager, I believe, at the time.

Q. Well, can you state the substance of the conversation with him?

Mr. McClennen: The same objection, if your Honor please.

The Court: Overruled.

Q. You may answer.

The Court: In Buffalo, you mean, or New York?

The Witness: He came to Rochester. He was very cordial, but could not do anything. I don't remember the details.

Q. Can you state what you said to Mr. Maw?

A. I objected to the clearance. I wanted to improve the clearance.

Q. Now, can you state the substance of what Mr. Maw said to you with reference to clearance.

The Court: What did you say to him on the subject of clearance and what did he say to you?

The Witness: I don't remember the exact details, but it was a conversation with respect to improvement of the run and the clearance.

Q. Well, can you state what the substance of what Mr. Maw said to you on that subject was?

A. That he could not do any better, he gave us the best he had to offer; that is the substance.

[fol. 2404] Q. Mr. Fenyvessy, did you have any written correspondence with any of the other major companies relative to obtaining an earlier availability of pictures?

A. Not that I remember.

Q. Did you ask personally of the various of the representatives of the other companies if they would sell you an earlier availability of pictures?

Mr. McClennen: That is objected to.

The Court: Oh, no. He can state what he did.

Q. Did you say you did?

The Court: Strike that out. Read the question. I think the question is too broad. Does it purport to have occurred in several conversations with individuals unknown?

Mr. Clagett: I will rephrase the question.

Q. Did you have any conversation with any representative or representatives of Warner Brothers with respect to obtaining an earlier availability of pictures?

Mr. McClennen: That is objected to.

The Court: I will let him state; did you have any talk with any representatives of Warner Brothers?

The Witness: Yes, sir.

Q. Could you fix the approximate date?

The Court: Who was it?

Q. Will you state first with whom you had such a conver-
[fol. 2405] sation?

A. The salesman in the territory, and I believe the manager was a man by the name of Ray Smith. I spoke with him about a better run.

Q. Did you have a conversation with the salesman also?

A. Yes, sir.

Q. Could you fix the date—strike it out. Who was the salesman?

A. I don't remember at that time.

Q. Well, can you state what conversation you had with the Branch Manager?

Mr. McClennen: That is Mr. Ray Smith? The same objection.

The Court: Overruled.

The Witness: Well, in substance, I tried to secure a better run.

The Court: What?

The Witness: In substance, my main conversation was that I tried to get a better run.

Q. What did Mr. Smith say to you?

A. That he could not do any better and that he would have to give us what other major companies were giving us.

Q. Was there anything further said along that line?

A. No, it was the subject of the conversation, but I don't remember.

[fol. 2406] Q. Was there any particular company mentioned, or companies, with reference to giving you the same clearance?

A. Metro.

Q. Any others?

A. I don't know, possibly Paramount.

Q. Did you have a conversation with any representative of R.K.O. with respect to buying an earlier availability of pictures?

A. Yes, sir.

Q. With whom did you have such a conversation?

A. A salesman by the name of Schimel.

Q. Can you fix the approximate date or dates, I will say fix the date of your conversation?

A. No, it probably was in 1937, but I don't remember, in the fall of 1937. I don't remember the date.

Q. What did you say to Mr. Schimel?

Mr. McClennen: Same objection.

The Court: Overruled.

The Witness: I wanted to buy second-run.

Q. What did Mr. Schimel say to you?

A. That Schine had the second-run.

By the Court:

Q. This was with reference to the two theatres?

A. The Madison and Monroe.

Q. I thought you did have the—didn't you have the [fol. 2407] second-run?

A. At one time we had it.

Q. This was after 1938?

A. Yes, sir.

Q. Do you mean at the time you lost the second-run of these major companies entirely, or just subject to the Schine second-run?

A. Yes, we had the second-run on R.K.O. Pictures at one time, and I know of one season, I think 1936, although I am not actually sure about the date, we did have second-run, we also had second-run on Warner Brothers on at least one occasion.

By Mr. Claggett:

Q. Mr. Fenyvessy——

The Court: Get the dates straight. Am I to understand you that you had second-run during all these years subject to the second-run by Schine at certain of the theatres? In other words, were you trying to get the equality of second-run or trying to get new products? Of course, you were not trying to get first-run?

The Witness: Trying to have equality of run in these two houses with similar Schine houses.

The Court: That is what I am trying to find out.

[fol. 2408] By Mr. Clagett:

Q. Mr. Fenyvessy, I show you Plaintiff's Exhibits 755 and 756, and ask you if you recall making those contracts for R.K.O. Pictures for the 1936-37 season?

A. I recall a contract. I didn't sign it.

The Court: Is that your contract? That is your contract?

The Witness: Yes, signed by my brother Paul.

By the Court:

Q. What does that say about the service?

Mr. McClennen: It reads, if your Honor please "After Schine clearance as granted by all major companies. Clearance on Webster Theatre 7 days ahead of all subsequent runs in the City of Rochester."

The Court: After all Schine, that would be first and second-runs of Schine's.

Mr. McClennen: Well, Schine had no first-run.

The Court: In some theatres?

Mr. McClennen: No, the first-runs were in the downtown theatres.

The Court: I understand that, but he had some downtown theatres.

Mr. McClennen: No downtown first-run theatres.

The Court: Then he had only second-run?

[fol. 2409] Mr. McClennen: He had himself only a second-run. This your Honor will observe, gave Mr. Fenyvessy clearance over all the Schine later-run theatres, gave him 7 days clearance over all the Schine theatres, except the Riviera and that group.

The Court: Yes.

By Mr. Clagett:

Q. Mr. Fenyvessy, you negotiated these subsequent contracts, Plaintiff's Exhibits 782 and 783 for the 1938-39 season, yourself, did you not, and sign the contracts?

A. Yes, sir.

Q. Were you attempting to improve the run of the Madison and Monroe Theatres at the time you made those contracts?

A. Yes, sir.

Mr. McClennen: That is objected to.

The Court: He was what?

Mr. Clagett: Will you read the question?

The Court: Attempting to improve what?

Mr. Clagett: The run.

The Court: State the facts.

Mr. McClennen: May this answer go out?

The Court: Do not state conclusions, state what was said.

Mr. McClennen: This answer may go out?

[fol. 2410] The Court: Yes.

By Mr. Clagett:

Q. At the time the contracts, Plaintiff's Exhibit 782 and 783, with R.K.O. were drawn, did you ask Mr. Schimel for *for* an earlier run?

A. Yes, sir.

Q. And what did Mr. Schimel say to you?

Mr. McClennen: The same objection.

The Witness: Well, in substance, that I could have the run that was available, and that whatever Metro gave, they would give us. We would have to follow the houses that we followed with Metro.

Q. Did you have any conversation with a representative of Paramount with respect to endeavoring to buy an earlier availability of pictures for the Madison and Monroe?

A. Yes, sir.

Q. Can you state whom you had such a conversation with?

A. Mike Simons.

Q. Could you fix the date of a conversation you had with Mr. Simons?

A. No, not definitely, some time in 1937-38.

Q. What did you say to Mr. Simons?

Mr. McClennen: Same objection.

The Court: Who is Simons?

[fol. 2411] The Witness: He was the salesman in this territory. His name was Mike Simons, for Paramount.

The Court: Overruled. What did you say to him?

The Witness: I asked him for second-run.

The Court: You mean by second-run, on a parity with certain Schine Theatres?

The Witness: Yes, with two Schine Theatres.

Q. What did Mr. Simons say?

A. That he could not give it to me.

Q. Did he say what they might do or would attempt to do?

A. Not that I recall, except that he refused to sell me any better run.

Q. Now, Mr. Fenyvessy, I believe you have testified

already that you sold out the Madison, Monroe, West-End and Liberty Theatres, to the Schine Company in February, 1939?

A. Yes, sir.

Q. Can you state what was the approximate date of the first contact you had with any representative of the Schine Company?

A. Oh, with respect to selling?

Q. With respect to a deal or the sale of the four theatres to Schine?

A. Possibly in 1936 or 7.

Q. Can you recall who you had your first conversation on that subject with?

[fol. 2412] A. Well, these conversation- were often——

Q. Can you say whom your first conversation was with?

A. Saul Shafer, I think.

Q. Who was Saul Shafer?

A. He was a local house manager for Schine in Rochester.

Q. Well, did you have or carry on negotiations with representatives of Schine over a period of time?

A. There were negotiations but they were often conducted by my father as well as my brother and myself.

Q. And whom were those negotiations with?

Mr. McClennen: You mean the ones he personally conducted?

Q. And the ones you had personally, or were present at when such negotiations were had?

A. Well, Mr. Schine and Howard Carroll and Mr. May and possibly Mr. Shafer.

Q. And eventually a deal was arrived at?

A. Yes, sir.

Q. What was the price at which the theatres were sold?

Mr. McClennen: Just a moment. This was a large transaction and papers better show what it was.

The Court: The contents will show what it was.

Q. Do you have a copy of the agreement that was made, Mr. Fenyvessy?

A. I think so.

Q. Do you have it with you?

A. No.

[fol. 2413] Q. Will you endeavor to obtain a copy of that agreement?

Mr. Wright: Perhaps I misunderstood your Honor's ruling. I thought you said he could state what the amount of the transaction was.

The Court: The contract is the best evidence.

Mr. Wright: That may be. We are not attempting to prove the terms of the contract. All he is being asked is how much he received. I suppose if he knows he should be able to state that independently of any contract.

The Court: You mean how much he received as indicating how much the purchase price was, or possibly something different?

Mr. Wright: I submit he is competent to state what that was, even without the contract in front of him, if he knows; if he would have knowledge of what the total price was.

Mr. Clagett: That is all I want to elicit from him at this time is the total purchase price.

The Court: The defendants have the contract here, have they not?

Mr. Clagett: You have the contract, Mr. McKay?

Mr. McKay: We have not been subpoenaed to produce the contract and have made no search for it. I assume [fol. 2414] we have it and will make a search for it if desired.

The Court: Is there any question raised as to the amount?

Mr. McClennen: We don't know whether—there is no question that the documents which show the consideration and the terms——

The Court: Your objection is that it is not the best evidence?

Mr. McClennen: Not the best evidence and not the most expeditious way of proving the actual transaction. The papers have got to speak for themselves. It is almost impossible for a witness to state all the terms of a written document, and the consideration is meaningless unless all the terms are there and the document itself will tell the story.

The Court: Objection sustained.

By Mr. Clagett:

Q. Can you state, Mr. Fenyvessy, how the purchase price which you received at this sale compared with the original investment in the theatres?

Mr. McClennen: That is objected to.

The Court: You mean whether it was more or less?

Mr. Clagett: Yes.

[fol. 2415] The Court: I will let him state whether it was more or less.

Mr. McClennen: I would urge, your Honor, that this would involve a very needless, expensive operation. This investment is over a period of years, running way back.

The Court: I don't think, standing alone, the fact that he paid $100,000 and sold it for $50,000, years after, would have much probative effect, because there might be times and circumstances enter into it, aside from the—if he did not make a profit it might indicate, of course, that there was a motive other than the profit involved.

Mr. McClennen: The objection is not, at this stage, to anything such as is suggested here that this witness could not answer this question without involving in his answer all the expenditures that were properly capital expenditures through a long period of time, many of which he had nothing to do with.

The Court: This question does not go so far as that. He just asks for the price received as compared with the price paid, to show a comparison, that is all. You have [fol. 2416] pointed out, as I have, there are a good many elements that enter into the question, by way of explanation of the difference.

Mr. McClennen: The Witness has not appeared yet to be the one who paid the original price.

The Court: That is another question that I think he got this from his father. As I understood it, he acquired this from his father, this property, but I will let him state whether it was more or less, if he knows—whether the price that they received for it was more or less than what they paid for it. That calls for personal knowledge, of course. If you don't personally know of the purchase transaction you can't testify. You can tell what you sold it for.

By Mr. Clagett:

Q. Do you know, Mr. Fenyvessy?

The Court: Do you know what price you paid for these theatres?

The Witness: Yes, approximately, yes.

The Court: I will let you ask the question.

Mr. McClennen: I will press the objection.

The Court: Whether you received more than you paid for them or less.

[fol. 2417] The Witness: No, approximately what they cost was received.

Q. Did you make, at the time of the lease, a non-competitive agreement?

A. Yes.

Mr. McClennen: May that be excluded for the moment? We have the agreement right here.

The Court: Of course, that is the best evidence.

Mr. Clagett: I have requested it this morning and I did not know it was here.

(The agreement between Paul Fenyvessy and Munmad Theatre Corporation was marked as Plaintiff's Exhibit 790 for identification.)

Mr. Clagett: We are offering this agreement, which has been handed to me by Mr. McKay, in evidence as Plaintiff's Exhibit 790. I simply want to refer to the period of time involved and the parties. It is an agreement made the 10th day of Febrauary, 1939, by and between Paul Fenyvessy and Chester Fenyvessy of the city of Rochester, with Munmad Theatre Corporation in Gloversville, New York—

Mr. McClennen: Your Honor, the general objection that has been made heretofore applies to this, that is, that this [fol. 2418] is not an agreement that has any effect upon interstate commerce. It was a purely local transaction. Your Honor has already ruled on that, and we simply preserve it here.

The Court: I don't know what Counsel indicated by one statement here, as to what the document purports to be.

Mr. Clagett: I merely want to call your attention at this time to the provision in the document as to the number of years involved, as part of the general picture, which the Government is offering these noncompetitive agreements, to show that a number of people——

The Court: What you term as a noncompetitive agreement, that is what you mean?

Mr. Clagett: Yes.

The Court: Received.

Mr. Clagett: For the period of time 20 years from February 10, 1939.

Mr. McClennen: I thought you were going to read the agreement.

The Court: Have it marked in evidence first.

(The agreement previously marked Plaintiff's Exhibit 790 for identification was received in evidence.)

[fol. 2419] Mr. McClennen: I ask that the narration of what the agreement said be stricken out.

The Court: Strike it out.

Mr. McClennen: If the whole agreement on this subject is to be read it should be that and not just a phrase of it.

The Court: I invited the answer, I guess.

Mr. Clagett: I would like to read it in full.

"Agreement, made this 10th day of February, 1939, by and between Paul Fenyvessy and Chester Fenyvessy, of the City of Rochester, County of Monroe, State of New York, with Munmad Theatre Corporation, of Gloversville, New York,

Witnesseth, in consideration of one dollar in hand paid, and other good and valuable consideration, the receipt whereof is hereby acknowledged by each of us severally, we, Paul Fenyvessy and Chester Fenyvessy, and each of us, agree that we will not, indirectly or directly, personally or through any stock interest, (except ownership of stock in any amusement enterprise listed upon any recognized Exchange) partnership with Albert A. Fenyvessy or any [fol. 2420] other person or association by us, or any of us, or otherwise, engage in the business of the exhibition of motion pictures or in the operation, management or control of motion picture theatres in the City of Rochester, except in the so-called down-town area which is hereby agreed as follows:

Bounded on the west by Plymouth Avenue, North, and Plymouth Avenue, South; on the east by Union Street, North, and Union Street, South; on the north by Andrews Street, and on the south by Court Street, for a period of twenty years from February 10, 1939, and

Except as to road shows at advanced prices to be presented at the Auditorium Theatre in the Masonic Temple at 875 East Main Street, Rochester, New York.

In Witness whereof, each of us has hereunto set our hand and seal the date and year first above written."

By Mr. Clagett:

Q. Mr. Fenyvessy, has complaint ever been made by any representative of Schine that you have breached this [fol. 2421] agreement?

Mr. McClennen: That is objected to. Now that your Honor has heard the agreement read and seen the extremely confined area to which it relates, we move that it be stricken out as having no effect whatever upon interstate commerce.

The Court: Oh, no. Motion denied. On your last question, why is it essential to prove that he has not violated this agreement?

Mr. Clagett: I want to show, your Honor, that the Schine organization are regarding this agreement as preventing them from operating any theatre or being connected with any theatre in the city of Rochester, or having anything to do with any theatre in the city of Rochester, except those excluded.

The Court: That is for the Court to say what the contract is, is it not?

Mr. Clagett: I don't think it would be a question of interpretation, because the statement of facts would clearly indicate that it did not fall within this agreement.

The Court: It limits his engagement in the theatrical [fol. 2422] business within a certain section of the city. Your question here is directed to the inquiry as to whether Schine ever claimed that he ever violated this agreement.

Mr. Clagett: Yes, but I think I shall withdraw this inquiry, and that is all.

The Court: We will suspend until 2 o'clock.

(Whereupon a recess was taken until 2 o'clock P.M.)

[fol. 2423] After Recess, 2 o'clock P.M.

Appearances: As before noted.

Mr. McClennen: With the approval of the plaintiff's counsel, we offer a map of the City of Rochester.

The Court: Are you through with your examination of this witness?

Mr. Clagett: Oh, yes.

The Court: Received.

(Thereupon map of the City of Rochester, referred to, was marked as Defendants' Exhibit D-112 in evidence.)

CHESTER FENYVESSY resumed the stand by and on behalf of the Plaintiff, and testified further as follows:

Cross-examination.

By Mr. McClennen:

Q. Mr. Fenyvessy, I call your attention to Defendants' Exhibit 112 on which the theatres in Rochester have been marked. Now, first, what is the approximate center of downtown Rochester? I don't mean in the survey sense, but in the business sense?

[fol. 2424] A. Clinton and Main.

The Court: What is that?

The Witness: Clinton and Main.

The Court: The Four Corners, about that.

The Witness: You mean where the business radiates, what is the business section?

Q. Yes, I should say so.

A. Clinton and Main.

Q. Would you indicate it for me? You needn't mark it, but just point to it.

A. Clinton and Main, right there (witness indicating on map, Exhibit 112.)

Q. You have indicated a point approximately where the R. K. O. Temple Theatre is?

A. Yes, half a block away from there.

Q. The R. K. O. Palace Theatre is right close, perhaps an eighth of a mile away?

A. Well, it is about a block and a half, maybe.

Q. A city block and a half?

A. Yes, short blocks there.

Q. Then the Paramount Regent is about the same distance away?

A. Oh, no, it is a greater distance.

Q. It is a greater distance?

A. From Main, yes.

[fol. 2425] Q. How far is it from the center?

A. Well, it is about,—from Clinton and Main it is about two and a half or three blocks.

The Court: It is on——

The Witness: On East Avenue and Chestnut.

Q. Now, where is Loew's Rochester?

A. It is on Clinton Avenue, South, at the corner of Court, here (indicating).

The Court: It has changed since I went to college there, I mean, there was a shift of business.

The Witness: It used to be the Four Corners.

The Court: Yes, I went to the university there, I know the place pretty well.

The Witness: The University has changed, too.

The Court: Oh, yes.

Q. Where is Paramount's Century?

A. It is there, right there, Clinton Avenue, North.

Q. Again within a block or so of the same region?

A. Oh, yes. It is a very short block closer to Clinton and Main than is the Palace Theatre.

Mr. Clagett: Which theatre was that?

The Court: The Palace.

The Witness: The Century is closer to Clinton and Main than the Palace is.

The Court: Both on Clinton near Main?

[fol. 2426] The Witness: Yes, both on North Clinton.

Q. Have I now named all the regular first-run downtown houses?

A. Yes, sir.

Q. Now, the Capitol, the R.K.O. Capitol?

A. Is on West Main Street.

Q. That is about how far from the center?

A. Well, it is about a half a mile. It is across the river on this side (witness indicates on map, Exhibit D-112.) It is on the other side of the Genesee River, on West Main Street, and it is west of the Four Corners.

The Court: It is west of the river?

The Witness: It is on Main near Plymouth.

By Mr. McClennen:

Q. Now, as you radiate out, where is the Grand?

A. It is around the corner from the Capitol, it is on Plymouth Avenue, North.

The Court: Where?

The Witness: It is around the corner from the Capitol on Plymouth Avenue, North, about a third of a block from the corner, less than a third of a block.

Q. Is there any nearer to the center, among the later run houses than the Grand?

A. Yes, the Strand.

[fol. 2427] Q. The Strand is where?

A. It is on St. Paul Street.

The Court: North or South St. Paul?

The Witness: Well, it would be North St. Paul. St. Paul changes and becomes St. Paul at Main Street. It used to be North and South St. Paul. Now St. Paul Street is north of Main Street.

Q. And the Strand is about how far from the center?

A. From Clinton and Main?

Q. From Clinton and Main?

A. Well, it is about four blocks and in a side street location.

Q. And the Grand is about how many blocks from the center, from the crossing of Clinton and Main?

A. Oh, it appears to be about five blocks of varying sizes.

Q. Now, what is the location of the Eastman Theatre?

A. It is on East Main Street.

Q. And about how far from the center?

A. Four blocks of various sizes.

Q. The Madison Theatre is by straight about two miles southwest of the center?

A. Yes, a little more than two miles.

Q. And while we are down in that direction, the West-End is about three or four miles by straight from the center, Clinton and Main, to the southwest?

[fol. 2428] A. Not over three miles, because it is a mile from the Madison to the West-End.

Q. Not over three miles, but approximately three miles?

A. Yes, sir.

Q. The Arnett is how close to the West-End in that same southwesterly area?

A. Approximately a mile.

Q. The Monroe is—I am afraid I misled you. I said southwest for the Madison and West-End; it is actually southeast.

A. Southwest. There is west and south. This is west, this is east, this is south and this is north (indicating on Map, Exhibit D-112.)

Q. Oh, this map is laid out not in the usual top to the north?

A. Yes, the top is, this is the north, this is the south. That is the west and this is the east.

Q. The Madison then is, as I first stated, in the southwesterly section?

A. Yes, sir.

[fol. 2429] Q. Now, go to the Monroe. That is in the southeasterly section, and how far from the center?

A. It is about a mile and a half from the center.

Mr. Clagett: Excuse me, Mr. McClennen. I think it ought to be pointed out to the witness, this map has these rings, that I believe are each one mile apart. I think that little scheme on the map shows that. It should not be a matter of guesswork.

Mr. McClennen: You notice that I am asking him from the practical sense by the streets, not as the crow flies.

The Court: You asked him the distance between certain of those theatres.

Mr. McClennen: By streets.

The Court: He said one is a mile from the other. That was not by streets.

Mr. McClennen: The Arnett and the West End are substantially on the same street, a mile apart, so that air-line and street-line distances in that case were the same.

The Court: The Arnett and the other theatre, would they be on the continuation of the same street?

The Witness: Oh, yes, they are actually on the same street.

Mr. Clagett: If you were fixing the distance from down-[fol. 2430] town center, the best method would be with relation to these radius lines, would it not?

Mr. McClennen: Not by street. I was trying to ask him about a time before airplanes were in use, to find out how far, as a walking or travel matter, it was from one to the other.

The Court: I suppose the airplane has nothing to do with it. I suppose those are actual distances, are they not?

Mr. McClennen: Yes. If your Honor please, I apparently have not made myself clear. These circles that were

referred to are on a straight radius from the center. The distances I am trying to bring before the Court are the distances of travel between the two theatres which would involve sometimes a diagonal street.

The Court: I think an approximation is sufficient here. I don't think we are concerned with a mile and an eighth or a mile and a quarter. You can go ahead.

Mr. McClennen: I made my comment only because of the reference to the circumferential lines, the circles drawn on the mile radii.

[fol. 2431] By Mr. McClennen:

Q. The Dixie Theatre is in the northeast neighborhood?

A. Yes.

Q. And about how far from the Madison as you would travel?

A. About five miles, approximately; maybe a little more or less.

Q. The Webster is in the northeasterly section, something like five miles from the Madison?

A. Not over five miles.

Q. And the State is in the easterly section, four or five miles from the Madison?

A. Yes, I think so, approximately the same distance.

Q. And the Webster is how far from the State?

A. About a mile, approximately.

Q. And the Dixie is how far from the State?

A. Around two miles, less than two miles, but approximately that.

Q. Of those three theatres, the Dixie, the Webster and the State, the Dixie is the farthest from the Madison, is it not?

A. No, they appear to be approximately the same distance on the map.

Q. As you recall the locations on the ground, about the same distance?

A. Well, I think of the Dixie as being farther away than [fol. 2432] I do the State, but they appear to be the same distance.

Q. The Cameo is located where?

A. It is located on Clinton Avenue, North.

Q. In the northerly part of the city?

A. Yes.

Q. And about how far from the West End Theatre?

A. About four miles.

Q. The Riviera is on the westerly side of the River, in the northerly part of the city?

A. Yes, north I would call it.

Q. On what streets?

A. Lake Avenue at Flower—Flower City, I guess it is, yes.

Q. And the Riviera is about how far from the Madison?

A. Oh, approximately four miles.

Q. The Liberty is south of the Riviera, about how far?

A. Approximately a mile—from the Riviera or from——

Q. From the Riviera.

A. Yes, approximately a mile.

Q. It is on Driving Park Avenue?

A. Yes, near Dewey.

Q. Near Dewey. And how far is the Liberty from the Madison?

A. About three miles.

Q. How far is the Liberty from the Monroe?

A. A little over three miles.

Q. When did your father first become interested in the [fol. 2433] exhibition business in Rochester?

A. Oh, about 1909.

Q. And, in the substantial sense, were the so-called Fenyvessy theatre interests his interests up to 1939 or 1940?

A. Yes.

Q. In 1909 he was the very active head of the Fenyvessy theatre operations, was he not?

A. Yes, he was younger and more active at that time than he was later, but he remained the head.

Q. Remained the head to the end?

A. He made the deal with Mr. Schine.

Q. That is, he personally conducted——

A. The negotiations.

Q. The negotiations. Had he, just before that, been active in the Fenyvessy theatres management?

A. In an advisory way, yes.

Q. He was how old at the time of the transaction with Mr. Schine?

A. 84—83—83 or 84.

Q. He was desirous of disposing of his theatre interests, was he not?

A. He disposed of them.

Q. You caught the question, did you?

A. My answer is he disposed of them. I don't know whether I can answer it otherwise. Does that answer it? [fol. 2434] Is that a satisfactory answer?

Q. I am interrogating.

Mr. Wright: If the Court please, this witness isn't competent to testify to what his father desired, in any event.

Q. Did your father tell you he wanted to dispose of the theatres?

A. No, I don't recall his having told me that.

Q. You had no information yourself as to whether he was desirous of disposing of these theatres?

A. Well, I spoke to him often. I lived with him and I know that he disposed of them.

Q. All that talking with him and living with him and his final disposition of them conveyed to you that he desired to dispose of the theatres?

A. Well, in my conversations with my father I became aware of the fact that he was annoyed with some of the difficulties of the operations. It was difficult to buy films and there were certain difficulties.

Q. Did you become aware of the fact that he desired to dispose of the theatres?

A. I supposed that he sold them because it was his desire.

Q. And how long had he aroused the supposition in your mind that it was his desire to dispose of the theatres?

A. Well, he had frequent contacts with Mr. Schine and his representatives and that led to the disposal of the theatres.

[fol. 2435] Q. Over what period of time?

A. Over several years.

Q. That is, for several years you had entertained the supposition that he desired to dispose of the theatres?

A. Oh, I don't think that he did for several years because the deal would not have taken so long if he had desired it.

Q. When would you reach as the time when you became aware that he did desire to dispose of the theatres?

A. Well, I can't exactly state. There were negotiations off and on over a period of several years.

Q. Now, during those several years he was not participating in the active management of the operations of the theatres, was he?

A. Yes, in an advisory way, yes, always.

Q. Did he advise you on the matter of the product to be bought?

A. Yes, sir.

Q. Did he advise you on the prices to be paid?

A. Yes, sir.

Q. Did he advise you on the clearances that you should seek?

A. Oh, yes.

Q. In this period of several years that you have described, the latter several years, the Schine interests were operating —I will read them down and you say "No" at any point [fol. 2436] where you think that I haven't got it correctly: The Grand, the Riviera, the Liberty, the State, the Dixie.

A. At what time? They were not continuous operations.

Q. Well, the Dixie from 1932 on.

A. Yes, 1932, I am not positive about the date, but they acquired it later.

Q. The Lake was not operated by the Schine interests?

A. Later it was, but not in its inception, later it was.

Q. Was that in the—that was not in the Fenyvessy-Schine deal?

A. The Lake?

Q. Yes.

A. Oh, no, we had no connection with the Lake.

Q. The Cameo?

A. Later acquired by Schine.

Q. They acquired the Cameo by 1936?

A. I think it was later, although I am not positive.

Q. And in general throughout the period, the Riviera——

Mr. Wright: During what period?

Q. Well, the Riviera from 1926, the Liberty from 1926, the State from 1926, and the Dixie from 1932 had in general the next run to the downtown theatres.

Mr. Wright: If the Court please, I suppose the contracts show what runs they had; the same objection that was [fol. 2437] made on direct here.

The Court: If he knows, he can state what was actually shown.

Mr. McClennen: That was what I desired.

The Witness: No, not in 1926.

Q. Do you remember when the Riviera began to show pictures next after the downtown theatres?

A. Oh, some time after Schine acquired it, but not immediately.

Q. Well, 1928?

A. Some pictures, yes, sir.

Q. And the Liberty operated in the Schine group next after the downtown first-run from some such early date as that?

A. Around 1929 or '30, possibly, 1931, I am not positive of the exact date.

Q. The State operated in the group that had the next showings to the downtown theatres from some such early date, 1926, 7 or 8?

A. In some instance-, not always.

Q. You have described in your direct examination the—what I will call the "2 and 2" operation; the first of the Schine showings would be in the Riviera and day and date there at the State or Dixie and then the next showing would be in the Liberty and Dixie or State, is that correct?

[fol. 2438] A. Or Webster, I think, yes, that is right, two houses, one Sunday, for example, and two houses the next Sunday.

Q. The day and date showings being distributed — the separate localities so that the two theatres that were showing on the same night were not the immediate competitive ones with each other?

A. The Riviera would play the Dixie and the Liberty and State would play, as an example.

Q. In round terms, there were four suburban areas, namely, the northwest, the southeast and the northeast areas?

A. Yes, sir.

Q. Were those to a considerable extent dwelling areas?

A. Yes, sir.

Q. What was the general character of the four neighborhoods with respect to class of dwellings?

A. The first quality neighborhood?

Q. Anyway, that will describe it.

A. Well, the Riviera was in a very first-class residential district and the State was in a lesser district, and the Dixie was still less in quality and the Liberty was in a good middle-class section with the Riviera.

Q. Now, the Madison area and the Monroe area?

A. The Monroe catered to a very nice clientele, people, I should say, in the Riviera class, and the Madison also had

[fol. 2439] a nice clientele, not as good as the Monroe or Riviera, but good.

Q. It has appeared in the contracts that have been put in, that in some instances, at least, you had seven days clearance over all subsequent runs thereby including all the Schine theatres, except the Riviera, Liberty, Dixie and State; you recall that fact?

A. I think it happened at times; I am not sure that it was always that way.

Q. That clearance you sought, did you?

A. We paid more money than other houses; yes, we sought the best clearance always we could get.

Q. What?

A. We always sought the best we could get.

Q. Both in area and length of time?

A. I don't understand that. You mean to say getting pictures as early as we could?

Q. No, clearance, I was speaking of all subsequent houses, you sought all the clearance that you could get?

A. Yes, we got what was the custom in that section, that the film exchanges gave us.

Q. And you sought it because you believed that it would help the prosperity of your theatres to have it?

A. We thought that we were buying at a higher price and that we were entitled to certain protection as was a house or houses before us.

[fol. 2440] Q. But you wanted it because you thought it would help your theatres' prosperity, did you not?

A. We believed that we were paying for——

Q. That is a rather easy question. Couldn't you tell us that? Will you read the question?

A. Repeat the question, please.

(Last question read.)

A. Certainly.

Q. You wanted it all over the city, did you not?

A. It was the custom to have it. Whatever clearance you got had reference to the city, yes.

Q. That is what you were seeking to get was over the whole city, was it not?

A. Subsequent runs we wanted to stay away from as long as we could.

Q. That is, you did not want any pictures which showed in your theatres to show again in any place in Rochester for

as long a time as you could secure clearance for. That is it, is it not?

A. We expected that they would be played the next week, which they were.

Q. I will ask to have the question read. You will see how plain and direct it is. (Question read.) Are you nodding your head "Yes"?

A. Yes.

[fol. 2441] Q. Remember, the stenographer has no periscope.

A. I said yes. Perhaps not loud enough.

Q. Can you describe to me the Cameo Theatre?

A. Structurally?

Q. For theatre purposes in every respect that you can describe.

A. It is a modern house, with orchestra and balcony floor, and I am not positive of the capacity, but I imagine that it is approximately 1200, maybe a little more, on the two floors. It is steel and brick and concrete.

Q. Would you call it practically a first-class suburban theatre?

A. I would call it a very good suburban theatre, yes.

Q. Will you describe to me your West End Theatre?

A. The West End Theatre was in a better neighborhood, but it was not as large a house as the Cameo. It was a one-floor house, wide house, with approximately 800 seats, and it had the usual appurtenances, not a better—it was a less expensive house than the Cameo, I should judge, because it was less house.

Q. Do you remember for how long a period of time the West End had clearance and showed ahead of the Cameo?

A. No, I don't know that it did. I don't know that it showed ahead of the Cameo. I don't think it did.

Q. You don't think that the West End showed ahead of [fol. 2442] the Cameo? Now, consider, and tell us.

Mr. Clagett: May I ask Mr. McClennen what date he has in mind?

Mr. McClennen: If he did not do it at all there would be no date. I want to get the fact.

Mr. Wright: The contracts would show, your Honor.

The Court: This is cross-examination. I will let him state.

The Witness: There were different times the conditions changed. It may have been ahead at times and at times after. I don't remember.

Q. Do you remember seeking clearance for the West End over all other houses in Rochester except the first-run houses and the Schine group of four?

A. At the West End?

Q. Yes.

A. Oh, no. We did not ever seek clearance over—at the West End over these Schine houses, these four Schine houses.

Q. No, I said other than the four Schine houses.

A. Oh, other than the four Schine houses?

Q. Yes.

A. Qh, well, we had talked at times about securing a better run at the West End with respect to the Arnett, because we were of the impression we were paying more money and therefore entitled to it, but we were not interested in getting [fol. 2443] a better run at the West End with respect to other theatres.

Q. Don't you remember that you sought and obtained clearance for the West End over subsequent run houses which would include the Cameo?

A. No, I do not.

Q. You remember nothing of that. You sought clearance for the Monroe, Madison and West End over the Webster, did you not?

A. When it was not operated by Schine, yes.

Q. And in a number of years you obtained that clearance, did you not?

A. When we paid more money than Webster, yes, we did.

Q. And there you sought it because you thought it would improve the business of the Madison, Monroe and West End if you had that clearance, did you not?

A. We were willing to pay more money, which we did, for that particular run, for that protection, because we thought it would be advantageous to the houses, and justified.

Q. That is, it would help the houses if they had——

A. Yes.

Q. —that clearance over the Webster; which houses particularly of the Madison, Monroe and West End did you think it would help if you had clearance over the Webster?

[fol. 2444] A. Well, the Monroe was closer to the Webster than was the Madison, and so I believe that the Monroe was the one we were interested in.

Q. In your judgment as a theatre operator, would it be advantageous to the State to have clearance over the Monroe?

A. Yes, definitely.

Q. Definitely. That is, if you were operating the State and somebody else was operating the Monroe, Madison and West End, you would seek to get clearance in favor of the State over those three?

A. Yes, if I could pay for it—yes, I would want it.

Mr. Wright: I might be able to shorten this by stipulating that any operator wants to get the best clearance he can all the time for any house that he operates.

Mr. McClennen: I am seeking more than just this fact which the plaintiff has just suggested willingness to stipulate to. I have in mind the argumentative letters that were put in from this witness to the point that there was no reason why the Liberty, Riviera, State and Dixie should have clearance over the Madison and Monroe. If the stipulation [fol. 2445] would go so far as to say that that argument in those letters was unsound and not in accordance with the facts——

Mr. Wright: The argument in the letter is perfectly sound. The mere fact, with two exhibitors, each one wants to have clearance over the other, and it is, of course, a decision the distributor has to make as to which one is entitled to it, and he ordinarily makes that decision, I suppose, upon the basis of rentals and what he considers relative conditions. But the mere fact that each one desires clearance over the other I do not see has anything to do with—any relevance to the question Counsel just discussed here, as to whether the distributor should or should not allow them to play day and date or give one clearance over the other. It is always assumed each one desires the best break it can get, but I do not see that it has anything to do with the choice the distributor should make.

Mr. McClennen: I evidently have not made clear to Mr. Wright what I was aiming to say, and I hope I have to your [fol. 2446] Honor, that I was endeavoring to show that the arguments in those letters were not sincere arguments when

they said that there was no reason why the State and others should have a clearance, and I am asking——

The Court: That might depend on the type and basis of theatres, and the question of their location. The owner of those theatres might think he is entitled to an equal break with someone who has a second-run. Of course, all of them want to get as much clearance as they can. That is true.

Mr. McClennen: They want to get as much clearance as they can where the areas are competitive, and it was stated in those letters that those areas were not competitive, and I have brought this out from the witness to show they were competitive.

The Court: I don't think we can get a stipulation that would help us very much. There are different facts to be considered.

By Mr. McClennen:

Q. For the Madison and Monroe you wanted and sought not merely a better run but also a period of clearance over [fol. 2447] all subsequent run houses, did you not?

A. No, I don't believe that there was any question about the clearance as much as the question of early run.

Q. Protection, you understand and use to describe the period of time to elapse after the prior run before the next run begins, do you not?

A. And the clearance, too.

Q. And clearance, too. For the Madison and the Monroe you were seeking from the distributors not merely an earlier run than other theatres had, but also a period of time of clearance after the close of your run before they should run in the other houses. That is so, is it not?

A. I was seeking always a run equal to the Riviera run and the theatre that ran with the Riviera, and nothing better. Just that. Just that same quality of a run.

Q. You were seeking clearance, in addition, over other theatres, were you not? I am not speaking of the Riviera.

A. I was not asking for any clearance that was not regularly given to such a run.

Q. And you were seeking that period of clearance because you thought it would help your theatres if the other theatres were postponed that length of time before they began their showings?

[fol. 2448] The Court: I think that has already been answered.

A. Shall I answer that?

The Court: It seems to me that is already covered.

Q. That included the Schine deferred run houses as well, did it not?

A. I never made any demand with respect to the Schine subsequent run houses. I was not interested in anything excepting an equal run of the Madison and Monroe with two comparable Schine houses, one of which was the Riviera.

Q. You have already this afternoon said that you were seeking a period of protection, that is, clearance over the other subsequent run houses in the city. Now, that is so, is it not?

A. I don't remember that. I expected the same clearance that was ordinarily given to a run of that sort. I was especially interested in getting the run, and not especially interested in a clearance, but I expected to get the normal clearance, which was always about seven days.

Q. Over all the other Schine houses, leaving out the four we have been speaking of; that is true, is it not?

A. Yes, seven days, but I never made any point about that.

Q. Beginning with the fall of 1933 you sought and obtained clearance for the Madison, Monroe and West End [fol. 2449] over the Webster, did you not?

A. I don't remember the date, but after the Webster ceased to be operated by Mr. Schine then I sought, because I paid a price justifying such a run, and usually got it. Principally because I paid for it.

Q. The result was that when the Schine interests were running the Riviera, the Liberty, the State and the Webster, you had those four houses ahead of the Madison and the Monroe; that is correct, is it not?

A. Yes.

Q. And after you had secured clearance over the Webster the result was that you still had four houses ahead of you, namely, the Riviera, the Liberty, the State and the Dixie?

A. Yes.

[fol. 2450] Q. The obtaining of clearance over the Webster harmed the Webster as much as it helped the Monroe and the Madison, did it not?

Mr. Wright: If the Court please, that calls for a conclusion.

The Court: He said it wasn't in operation.

Mr. Wright: He certainly is not competent to give that; he doesn't know what happened at the Webster.

The Court: He said it wasn't in operation.

Mr. McClennen: No, it wasn't operated by the Schines, but was in operation.

Mr. Wright: Nor was it operated by the witness; how can he say?

Mr. McClennen: Well, he has had some experience in the theatre business from 1933 on for several years and the Webster was operated by Mr. Fogel and Mr. Tishkorf, or concerns in which they were interested, was it?

The Witness: I think that Mr. Schine was interested in it. I am not positive of the dates.

Q. From 1933 on for several years?

A. Well, I don't know the dates, but at one time Mr. Schine was associated with those gentlemen in the operation. That is hearsay. I am not positive, but that is my [fol. 2451] recollection.

Q. Well, do you remember that you just said that you didn't get clearance over the Webster when the Schine interests were operating it?

A. That is true.

Q. When you said that, you were speaking of a period when you thought that the Schine interests were operating it, were you not?

A. Yes, sir.

Q. What was the period that you thought that was?

A. Well, I don't remember the dates, but whenever the Webster had protection as indicated in our contracts that would indicate the time. I can't remember the years. I would like to, but I can't.

Q. Well, the contracts show that you began to get protection over the Webster in the fall of 1933. Possessed of that fact, would that enable you to say that that was the time when the Schine interests in the Webster ceased?

A. I should imagine so. That would be the time if that was the case.

Q. And Mr. Fogel and Tishkorf, or one of them, or concerns with which they were interested, operated the Webster for several years after that fall of 1933, did they not? [fol. 2452] A. I think so.

Q. Now, in that period, getting protection for the Madison and the Monroe over the Webster would tend to hurt

the Webster as much as it helped the Madison and Monroe, would it not?

A. The Webster could have played with us.

Q. I haven't asked you anything but just this, and would you listen to the question? Read it please, Mr. Reporter?

(Question read.)

A. Yes, sir.

Q. And you were, in Madison and Monroe, in competition with the Webster, were you not?

A. At the Monroe I should say.

Q. At the Monroe, you were?

A. Yes, the competition was more acute because of the proximity of those houses.

Q. And you realized that it was perfectly fair in that competition for you to get protection over your competitor if you could?

A. Because I paid for it. I bought that run.

Q. And you realized that it was just as fair in that competition for Messrs. Fogel and Tishkorf to get protection over the Monroe and Madison if they could, did you not?

[fol. 2453] A. Yes, sir, if they paid.

Q. And you realized in the same way, when the Schine interests were operating the Webster, that it was perfectly fair competition for them to get a protection over the Monroe and Madison, did you not?

A. No, I did not.

Q. That never has occurred to you, has it? Up to now, I mean.

A. Well, — realize that if I pay a price equal to some one else that I am entitled to the same run, and if I pay a greater price I am more so entitled to it; is that what you ask?

Q. What I asked,—I apparently did not quite get it—was you realized that it was perfectly normal competition for Mr. Fogel and Mr. Tishkorf to seek to get protection over the Madison and Monroe if they could negotiate for it, did you not?

A. They could not negotiate for it. If they would pay for it, they could have it.

Q. You realized the contest was a perfectly fair piece of competition and tried to get it, you realized that, didn't you?

A. Yes, every exhibitor wants the best run they can get.

Q. And wants protection if he can get it for that run or subsequent-runs?

[fol. 2454] A. Protection is set up and established, yes, sir.

Q. What?

A. The clearances were established and there wasn't much to be done in respect to that.

Q. They wanted it and sought to get it, didn't they?

A. Every exhibitor wants the earliest run and wants as good clearance as he can get, yes.

Q. And that applied to the operator of the Webster Theater just as much as it applied to the operator of the Madison or Monro Theatres, did it not?

A. Yes, sir, depending on who the operator was.

Q. The Liberty Theatre, during the period from the early thirties, to the time of the sale to the Schine interests, to which you have referred, was a source of revenue to your father, was it not?

A. Yes, he bought it and continued to rent it to Mr. Schine, yes, under a lease that was previously in existence.

Q. So that at the time that Mr. Schine or the Schine interests were getting the run, which they got for the Liberty, they were paying rent to your father for that Liberty, were they not?

A. That is right.

The Court: Was it rented on an annual basis or on a personal participation basis?

The Witness: It was on an annual basis, and it was once [fol. 2455] reduced when circumstances seemed to warrant it.

The Court: It was always on an annual basis?

The Witness: Yes. It was never on a participation; it was always a fixed amount.

By Mr. McClennen:

Q. It appears in Exhibit No. 733, the Paramount contract for 1931-32 product, the run is stated as a 5th run. Can you tell me what theatres had the preceding four runs? Of course, we can take it for granted that the downtown first-run had the first-run. Can you tell me who had the second-run then?

A. Well, the Schine Theatres, the four Schine Theatres constituted the four runs after the first run.

Q. That is, it was called fifth run, because there was a downtown run and then four Schine runs? Well, it sounds to me as if that would mean that you were to have the 6th run, isn't that so?

A. Well, I don't know, it would sound that way, yes, sir.

Q. You don't—did you ever hear those four Schine runs reckoned as separate consecutive four different runs?

A. Does the contract indicate that there were four Schine houses to run ahead of us?

Q. The contract reads "5th run" and reads "After Riviera, Liberty, State and Webster and day and date with Strand."

[fol. 2456] A. Well, then it meant that it was to follow those four Schine houses irrespective of any reference to run, to 5th run. That is what we got, a run after those four Schine houses and at the Strand Theatre.

Q. And running after the four Schine houses at that time you were to run day and date with the Strand, is that correct?

A. Yes, if that is what the contract says; that has been done in some cases.

Q. You will see that that is what the contract does say. I show you Exhibit No. 733, the "Protection Period."

A. Yes, that is right.

Q. Now, when the contract spoke of 14 days after, that had reference not to 14 days of clearance after the last run of the four, but to 14 days after the first booking in any one of the four, did it not?

A. No.

Mr. Wright: If the Court please, I think the contracts speak for themselves in each case.

The Court: He says it didn't mean that.

Q. Dealing——

Mr. Clagett: If the Court please, I think the contracts do vary. He is asking a general question, and covering a great deal of territory, when the provision in some of [fol. 2457] these contracts may vary. I don't believe he can ask a question of that character that this witness could possibly answer.

The Court: He is speaking about the four runs, what it means, whether it means consecutive runs or whether it means the run of the four theatres, all at one time.

Mr. Clagett: He was speaking about a period of 14 days, and assuming, I think, that that was the same in all contracts.

The Court: He is speaking of the contract here on the so-called 5th run.

Mr. Clagett: I did not so understand his question to be related to this one Paramount Contract.

Mr. McClennen: I have no question now.

The Court: His answer was "No," and I will let it stand.

By Mr. McClennen:

Q. The regular course of running the pictures by the Schine organization was to run them, first, of course, after first-run downtown, to run them first in the Riviera and at the same time either in the Dixie or the State; that is correct, is it not?

A. Yes, the Riviera with one of the other houses.

Q. And next to repeat the run in the Liberty and the State or the Dixie, whichever one hadn't yet played it; that is [fol. 2458] correct, is it?

A. Yes, sir.

Q. Now, as a practical matter of booking it, you could play 14 days after the Riviera if there were no matter of preferential playing time, is that correct?

A. I could play after the Schine protection with respect to the second week, the second group of houses; the first group of houses comprising the Riviera and another house were followed the next Sunday by two other Schine houses, and at the end of the clearance period, following that second engagement, then I could play and the protection or clearance varied in different contracts.

Q. And in some of these contracts, do you recall it was provided that it should be 14 days after the first theatre of the four in which the pictures were booked?

A. No, I don't. I am of the impression that the clearance clause was respecting the last playing of the picture in the second group of houses.

Q. I will leave that for the moment. I call your attention to Exhibit 788, which reads as to clearance "After Schine's protection, to be made available for dating 14 days after first booking in any one of the following theatres, Schine's Riviera, Liberty, State or Dixie," didn't you recall that you had contracts with that provision in them?

[fol. 2459] A. The contracts—this contract obviously was so. We used to have second-run with Warner Brothers.

Q. This was not a contract in which you had second-run with Warner Brothers, was it?

A. No, no, no, because it indicates that we followed four houses.

Q. Don't you recall running through the contracts this sort of a protection by which the 14 days was to be reckoned from the first booking at any one of the four houses?

A. No, I don't. The contracts——

Q. What?

A. No, I don't. The contracts were usually changed each year. The clearance and protection was not static.

Q. Well, I show you Exhibit 752, a Warner contract, of September 30th, 1935, with the provision "Clear over Webster Theatre after Schine's protection, to be made available for dating 14 days after first booking at any one of the following theatres, Schine's Riviera, Liberty, State and Dixie." Now, had you forgotten that there were provisions of that kind?

A. What date is that?

Q. 1935.

A. I had forgotten. 1935 is a long time ago and my brother Paul made the contract. I had forgotten. I didn't sign the contract. It was signed by my brother Paul, but [fol. 2460] the conditions changed.

Q. But you knew about it at the time, didn't you?

A. Well, it is possible, but I had forgotten.

Q. I show you Exhibit 788, from which I just before the last had read the protection; by whom is that signed?

A. Brother Paul.

Q. That is Paul, is it?

A. Yes, P. A. is the initial.

Q. P.; his middle initial is "A"?

A. Yes, sir.

Q. Paul is the first name and "A" is the initial?

A. It is his signature, not mine.

Q. Now, you have testified to some extent as to negotiating with Warner in 1935. Did you negotiate the contracts that were made in 1935 with Warner?

A. Oh, I believe so, but it appears that my brother had something to do with it, because he signed the contract.

Q. What?

A. My brother appears to have signed the contract.

Q. Didn't it sometimes happen your brother signed the contract when you had negotiated it?

A. Yes, I think so.

Q. Now, I show you Exhibit 724; is that your signature?

A. Yes, sir.

Q. And the provision there is "Pictures to play after the [fol. 2461] State, Riviera, Liberty and Dixie Theatres, to be available 14 days after the Riviera date and to be played within 14 days of availability." Now, had you forgotten that you had secured such a provision as that in your contract?

A. I can't remember all the contracts each year, but the——

[fol. 2462] Q. I have not asked you that.

A. Yes—I have forgotten the contracts, without referring to them.

Q. Well, now, it appears that that contract, Exhibit 729, is dated December 8, 1933, and is an RKO contract. Now that your mind has been refreshed by seeing the several contracts, does it not come back to you that you were securing that provision by which the pictures were available to your theatres fourteen days after the Riviera date?

A. No.

Q. You don't remember it now?

A. That year and those several years that you showed me contracts, but the contracts were not the same every year. The protection changed.

Q. Do you now recall that in the year 1933 and in the year 1935 you had that?

A. You show me those contracts for those particular years, and I do agree that those are the conditions.

Mr. Clagett: You mean for certain companies, Mr. McClennen, not all companies?

Mr. McClennen: I mean exactly what I said in my question. I was asking him and he has answered it, and the question was clear and contained nothing but what it said.

[fol. 2463] Mr. Clagett: You asked him a question which distinctly referred to the product of any or all of the companies.

The Court: No, I think he referred to the two dates, that is all, to a particular company.

Mr. Clagett: I did not so understand.

The Court: His answer is responsive to the question in that form.

By Mr. McClennen:

Q. And that was at a period when, from time to time, you were getting seven days protection over the Webster and over all subsequent run theatres, including the Schine subsequent run theatres?

A. Yes, and we were paying for it.

Q. Now, what was the first season that you had the Monroe?

A. 1933, I think. I am not quite sure.

Q. Who had operated the Monroe before that?

A. Oh, a film man had operated, I believe, just before we acquired it, a man by the name of Fater, and prior to that it was operated by the man who built it, a man by the name of Kircher.

Q. The first year that you got the Monroe you obtained a clearance of seven days over the other theatres that had been operating for some time in the city of Rochester, did you not?

[fol. 2464] A. We made new contracts for the Monroe when we acquired it, and paid a price that entitled us to a run equal to the Madison, and that is how we secured whatever run we had.

Q. You did secure it, did you not? What I asked you was whether you secured it.

A. Oh, if we had it, yes, we were given the run.

Q. You did have it, did you not?

A. Yes, we had it.

Q. Now, do you remember, and I am referring to Exhibits 741, 742, 743 and 744, that on June 16, 1938, you secured a franchise from Metro?

A. I don't remember the dates. If I saw the contract I would be refreshed, but I am sure I don't remember the dates. We played Metro pictures, but I can't say that I know the date.

Q. You remember in one year that you did have a franchise from Metro?

A. We played Metro pictures always during our operation of the Monroe.

Q. You remember that in one year you had a franchise from Metro, do you not?

A. We had no franchise. We had a contract.

Q. You had no franchise?

A. No, unless you call a contract a franchise. We made [fol. 2465] a contract to play a certain group of pictures, but we had nothing else.

Q. You know the use of the term "franchise" in the trade, do you not?

A. Why, I have not used it in connection with contracts for a single group of pictures or a single release. What I consider a franchise is something for a period of years.

Q. How many years?

A. More than one year.

Q. More than one year?

A. That is my understanding of it.

Q. It appears here that you had in Exhibits 741, 742, 743 and 744 contracts for full product from Metro for two years?

A. No, I never had and I don't remember that. I never made a contract for two years. I made a contract for a year's product, and if it refers to 1937-1938 product that means one year, but in my whole experience I don't remember ever having made a contract for two years for films.

Mr. Wright: If the Court please, all of these contracts are in evidence here. When the witness was examined on direct examination the objection was made to his covering [fol. 2466] this ground on the grounds the contracts were the best evidence. They were then identified, all put in evidence. Now we are going back over the ground, not on the basis of what the contract shows, but what the witness recollects about them. I do not see what purpose this serves or how it helps to establish the truth of any issue we are trying.

Mr. McClennen: The purpose is to show that Mr. Fenyvessy or his theatres had a Metro franchise in this year, if franchise means a contract for two seasons' product.

Mr. Wright: If he did, won't the contracts themselves show it? You have them there, haven't you? They are stamped with the exhibit numbers.

The Court: Couldn't we agree on the definition of what a franchise means?

Mr. Wright: Whatever he had is what is in the contract, in any event.

The Court: What does it mean as distinguished from a contract?

Mr. Wright: I understand it to mean what the witness said.

The Court: Two years?

Mr. Wright: A deal for two or more years.

The Court: Don't spend needless time, Counsel. Of [fol. 2467] course, the question whether it was one year or two years may be material, but the contracts show for themselves.

Mr. McClennen: I am interrogating the witness as to any assertion as to a trade term, to find out whether it was a franchise or not, and also to test his candor, at the same time.

The Court: Let him state, if he knows, what the distinction is between a contract and a franchise in the trade.

By Mr. McClennen:

Q. What does the term "franchise" mean in the trade?

A. My understanding of a franchise is something for more than a year, but contract for the product which is sold and described as 1937-1938—season 1937-1938, that comprises the product for a year, for a 12-months' period, and that is a year's contract for Metro pictures.

Q. If, on the same date, you negotiate for two years' product, that each year is put into a separate paper of that date as the product of that negotiation, according to the trade understanding, does that constitute a franchise?

The Court: Let me understand your question. You mean two separate contracts, one covering one year and one covering another year?

[fol. 2468] Mr. McClennen: Both negotiated on the same date.

The Court: Whether he understands that to be a franchise.

The Witness: I don't know. I never had the pleasure of making a two-year contract. I never could buy pictures except for one year, and the terms were always different the second year.

Q. On the 16th of June, 1938, you bought, did you not, the product for two years, and I show you Exhibits 741, 742, 743 and 744, all bearing the application date June 16, 1938,

and the approval date June 23, 1938? According to your understanding of the phrase "in the trade" did you get a franchise on that date?

Mr. Wright: Assuming he did or did not, where are we? What have we established as to what is in issue here?

The Court: I don't know. I will let him state the fact. I suppose the contracts themselves would show the periods they cover.

Mr. Wright: Yes.

Mr. McClennen: One of the things it establishes, your Honor, he said he never got contracts for two years' product, and I am asking about those.

The Witness: I never did. I did not sign the contract. It is signed by Paul Fenyvessy. I don't remember it at [fol. 2469] all. I did not sign it, never heard of buying two years.

Q. Oh, I see. And you did not know that your brother Paul had done this?

A. I don't remember. I don't remember the contract. I can't remember the contracts for many years.

Q. Look at them again and tell me whether you negotiated them?

The Court: What is the materiality if the contracts were two years or one? What bearing has it whether they made a two-year contract or a one-year contract?

Mr. McClennen: Because the witness just said he never made a contract——

The Court: If you are attempting to impeach him on an immaterial matter, it is of no importance. The purpose, I suppose, is to impeach his testimony. But if it is on an immaterial matter——

Mr. McClennen: If your Honor, please,——

The Court: I wonder what bearing it has, whether the contract was made for one year or two, on the issues.

Mr. McClennen: One of the issues in this case is attempted to be by pointing out that the defendants obtained franchises when others could not obtain franchises, and this [fol. 2470] is just one little piece of testimony to show that others could obtain franchises. That is where I feel it would have a bearing on the issue projected into this case, what we believe is an unfounded claim of the plaintiffs.

The Court: He said he has no knowledge. You have the contracts.

Mr. McClennen: Now I am asking him to look at them and tell me whether he negotiated those contracts.

The Witness: No, I don't remember having negotiated the contracts and I don't remember having—I see one contract, for 1937-1938—no dates here, as you say, but I don't remember and I did not sign the contracts.

Q. When you say you don't remember, do you remember definitely that you did not negotiate these contracts?

A. I don't remember having negotiated them. I had no purpose in saying that I never bought two years in succession if I actually did.

Q. Did you negotiate with Metro for product of the years 1937-1938 and 1938-1939 at all?

A. I don't remember.

Q. You don't remember of doing so?

[fol. 2471] A. No.

Q. Do you remember of having any communications yourself with Metro or any representative of Metro concerning product for those seasons?

A. No, I don't remember. It is possible that I had some talk with them, but I don't recall.

Q. Did you receive this letter, June 27, 1938, Exhibit 767, addressed to Mr. C. A. Fenyvessy by Mr. Rodgers, General Sales Manager of Metro (handing document to witness)?

A. Yes.

Q. And that letter related to the very product set out in these Exhibits 741, 742, 743 and 744, did it not?

A. It refers to one year's contract.

Q. Look at those numbers of the exhibits and tell me whether it did not refer to them?

A. Well, it refers, as I understand it, to one year's contract. It does not say two years, does it, in the letter? May I see the letter again?

Q. Certainly (handing to witness). It does not say one year's contract in the letter, either?

A. It says, "Your application for our 1938-1939 product," and as I understand your 1938-1939 product is a year's product.

Q. Now, what I asked you was whether the contents there referred to is Exhibit 743 and 744?

[fol. 2472] A. It does not refer to these, because it refers to the West End Theatre, and these refer to the Madison and Monroe Theatres, so it does not, as I understand the letter

—it refers to one year's contract, and this is the West End Theatre, but these contracts cover the Madison and Monroe.

Q. Oh, I see. Then in Exhibit 768 you were seeking to get for the West End Theatre open booking, were you, with the Schine theatres, the Riviera, State, Liberty and Dixie?

A. For the West End?

Q. Yes.

A. No, because in this letter we say we have two fine houses, and the two fine houses that we had were the Madison and the Monroe, not the West End, so it refers to the Madison and Monroe.

Q. This letter of June 28th, Exhibit 768, has no reference to yours of June 27th, Exhibit 767, then?

A. I don't think so, because this letter is an acknowledgment of a contract given by the West End, as I read it, and my letter of the 28th has reference to my effort to secure a better run for the Madison and Monroe. I don't think they refer to each other. I don't see any reference.

Q. Read me the part of the letter which you say, as you [fol. 2473] read it, refers to a contract for the West End Theatre. Just read the language that you refer to as the language which you read that in.

A. Oh, it says, "Mr. C. A. Fenyvessy, West End Theatre, Rochester, N. Y. My dear Mr. Fenyvessy: We gratefully acknowledge receipt of your application for our 1938-1939 product and are pleased to inform you of its acceptance, and at the same time express our appreciation for your consideration."

Q. That is what you read in that letter as referring exclusively to a contract for the West End Theatre, is it?

A. Yes, that is as I read it. I do not see any reference to three houses. I see only an address at the West End Theatre and it does not indicate that it is more than a year's product, or that it is concerning three houses.

Q. Well, now, let me call your attention to Exhibit 768, the letter of June 28, 1938, in which you say, "Your letter of June 27th, acknowledging our contract for Metro product 1938-1939 is indeed very cordial, so much so that I should like to know whether you will not give the proposition of improving our availability at the Madison and Monroe theatres which we took up with you a couple of years ago further consideration."

Now, do you mean that he was so cordial about a con- [fol. 2474] tract for the West End Theatre that you wanted

to take up another matter, a separate matter, of the Madison and Monroe theatres?

A. I think, Mr. McClennen, that this is a form letter sent out by the sales manager, in acknowledgment of a contract for the West End Theatre, and that is all I can think.

Q. You think that this letter of June 27th is not signed by Mr. Rodgers?

A. I don't think it is signed by Mr. Rodgers—I don't know whether it is his signature, but I don't think this is his signature. I think this is his signature, which is a different signature.

Q. On Exhibit 769, and that is the letter which he wrote in reply to yours of June 28, 1938, and what I was asking you was not what Mr. Rodgers' letter, not signed by him, referred to, but what your letter referred to, and asked you if having brought carefully to your attention the correspondence of the time you say that the contract that you were writing about in the letter of June 28, 1938, was a contract for the West End Theatre?

A. In this letter I am writing about the Arnett—pardon me, not the Arnett—Madison and Monroe theatres.

Q. In reply to this letter of June 27th, in which a contract [fol. 2475] was sent to you, contract application—I mean an acknowledgment of a contract application was sent you. With the two things before you, don't you know that the contract that you were referring to in that first letter was for the Madison or Monroe theatres or both of them?

A. No, the letter that is dated the 27th of June, addressed to the West End Theatre, and acknowledging the contract of the West End Theatre, was not received by me on June 28th, apparently, because I do not refer to it. I do not acknowledge it.

Q. What letter do you refer to in yours of June 28th where you say, "Your letter of June 27th, acknowledging our contract for Metro product 1938-1939 is indeed very cordial, so much so"——

A. I beg your pardon. You are right.

Q. By begging my pardon, do you mean to say you did refer in that letter of June 28th——

A. It is obvious——

Q. Wait a moment. If it was obvious why did you say just the reverse a moment ago?

A. Because I thought that was the situation, but——

Q. At this time where was your business office, where you conducted your correspondence?

A. At the Capital Theatre Building.

[fol. 2476] Q. At the Capital Theatre Building?

A. Yes.

Q. Did you conduct all your correspondence for all your theatres from the Capital Theatre Building?

A. Yes.

Q. Do you remember anything about the terms of your contract for the West End Theatre for the 1938-1939 product?

A. No, not without looking at the contract, I can't remember.

Q. And in writing about the contract for the West End Theatre were you writing about a transaction that you had had anything to do with?

Mr. Wright: If the Court please, he has not testified that he was writing about the West End Theatre in the second letter. He said at least five times, and according to the language of the letter it shows he was writing about the Madison and the Monroe.

The Court: He has referred to the letter, apparently.

Mr. Wright: It refers to the letter of prior date about the West End, but it is also equally clear from the letter he wrote referring to the earlier letter, that the second letter was about the Monroe and the Madison, and he has already said that five times.

[fol. 2477] The Court: The inquiry now is what the contract was at the West End.

Mr. Wright: His last question suggested that he had testified he had written a letter about the West End when there has not been any such testimony at all.

The Court: He said he must have been referring to that letter in the letter of the 28th.

Mr. Wright: He said he acknowledged that letter when he wrote his letter of the 28th——

The Court: The question is whether he knows what contract was made for the West End for the year 1937-1938.

Mr. Wright: That was not the last question, if the Court please.

Mr. McClennen: Could the question be read?

(Question read as follows: "Q. And in writing about the contract for the West End Theatre were you writing about a transaction that you had had anything to do with?")

[fol. 2478] The Court: Were you?

Mr. Wright: There isn't any letter——

The Court: Were you writing about the West-End contract? There is nothing here to show that he was writing about the West-End contract, except the letter which he had written——

By Mr. McClennen:

Q. Did you have anything to do with negotiating the West-End contract with Metro there for the 1938-39 product?

A. I don't remember.

Q. Have you any recollection of having to do with that transaction?

A. No, I can't remember. The only way I can remember is if I see the contract. I can't remember the date.

Q. Now, in your letter, Exhibit 772, you say "That part of your letter which refers to the Arnett and West-End situation"—, Mr. Connors says "That part of your letter which refers to the Arnett and West-End situation in Rochester, I have referred to Mr. O'Shea," and in the letter to which that is obviously a reply, Exhibit 771, you say "We have a situation which might interest you in Rochester between the Arnett operated by others, and the West-End operated by ourselves." You referred to your operation of the West-End in that letter for the purpose of bringing [fol. 2479] out a case where there was no clearance as between those two theatres, but they ran open booking?

A. Yes, sir.

Q. That is true, isn't it?

A. Yes, sir.

Q. And using it for an argument. Now, that letter was written from your office where?

A. At 85 Main Street, West, which is where all the letters are written.

Q. Is that in the Capitol Theatre Building?

A. Yes, sir.

Q. That is neither in the West-End, the Monroe, nor the Madison?

A. No.

Q. You had no office in any one of those three theatres?

A. No office for corresponding, no.

Q. And when you see that the letter from Mr. Rodgers is addressed to Mr. C. A. Fenyvessy, do you not recall to your

mind that you were the one that had to do with the negotiation there referred to?

A. It is my impression that this is a form letter that was sent out as a courteous gesture by the sales manager in acknowledgment of a contract made for the West-End Theatre, and I think that is not Mr. Rodger's signature. I think this is simply a formal acknowledgment.

[fol. 2480] Q. And if it was a formal acknowledgment of a contract signed by P. A. Fenyvessy, do you know why it was addressed to Mr. C. A. Fenyvessy?

A. Why, I don't know, but I would guess that the stenographer called P. A. C. A. I have no middle initial. I am just possessed of two names. P. A. and C. A. sound alike.

Q. So that you think that this letter, June 27th, 1938, Exhibit No. 769, was not designed for you?

A. I think that it was a form letter acknowledging a contract.

Q. And you think it was not designed for you?

A. That is my impression, because I don't remember having signed that contract. If the contract was signed P. A. Fenyvessy, and the letter of acknowledgment was signed C. A. Fenyvessy, it might have been intended for P. A. Fenyvessy.

Q. Do you recall why it was that Chester Fenyvessy was the one who acknowledged it and said "Your letter of June 27th is indeed very cordial"?

A. Chester Fenyvessy was always trying to improve the run and using every opportunity he could to correspond or make contact with the Film Companies for the purpose of improving the run.

Q. And, therefore, answering the letter which was not for him, is that it?

[fol. 2481] A. I took the liberty of answering any mail; I thought it might be all right.

Q. Whether it was concerning a contract for the Madison and Monroe Theatres, or a contract for the West-End Theatre?

A. I answered the mail that I felt inclined to answer, because it was sort of a family affair.

Q. And the West-End Theatre and Monroe and Madison were all in that same family affair?

A. They were all owned by the family, yes, sir.

Q. Have you any means of investigating among your papers to see whether there is a contract for the West-End Theatre of this date, June 19th, 1938?

A. Well, I will try. I don't know whether I have any. I imagine that the Metro pictures were played at the West-End Theatre. The Metro pictures were always played.

Q. I was interested in seeing if you could find any contract amongst your papers that so nearly fits this letter as these exhibits 741, 742, 743 and 744.

Mr. Wright: If the Court please, what possible difference could it make?

The Court: The statement does not call for any answer. It is simply the statement of counsel.

Q. Now, Mr. Fenyvessy, what was the first theatre of the group of Madison, Monroe and West-End that your father obtained?

[fol. 2482] The Court: I do not see the necessity for that. It seems to me we are going unnecessarily afield.

Mr. McClennen: Why, over my objection, the witness was permitted to make the comparison of the price received with the cost. I wish to show that the price received was a great deal more than the cost, and I am proceeding from the beginning with this witness to see what light he can shed on the cost.

The Court: All right.

Q. Which was the first theatre that your father——

The Court: Which was the first?

The Witness: The Madison.

Q. And you say he got that in about 1909—I mean 1929?

A. 1929.

Q. Was that the first of his business in Rochester in the theatre exhibition?

A. No.

Q. Did you have anything to do with the purchase of the Madison?

A. Yes, sir.

Q. It was the whole fee that was purchased, was it?

A. Yes, sir.

Q. And was it purchased for cash?

[fol. 2483] A. Was the consideration cash?

Q. Yes.

A. It was the assumption of a mortgage of $150,000, some cash and equities in real property, in real estate.

Q. And was that real estate some that your father had had for a long time?

A. No.

Q. Was it real estate that he had purchased for cash?

A. Yes, sir.

Q. And was the amount of the cash which was paid for the Madison Theatre, personally known to you?

A. I don't remember the amount.

Q. You don't remember the amount?

A. No, I don't remember the amount. There was cash and equities and the assumption of a mortgage. I do remember that the mortgage was $150,000, and I remember that one piece of property in which he had an equity of over $25,000, he paid $12,000 off on the mortgage at the time of the Madison Theatre deal.

Q. And you don't remember how much cash was paid in the Madison transaction?

A. No, I don't.

Q. What was the next theatre that he obtained?

A. I think the Liberty and the West-End.

Q. And did you participate in the acquisition of the Liberty?

[fol. 2484] A. I had some connection with it. I knew something of the transaction, yes, sir.

Q. Do you know how much cash was paid for the Liberty?

A. I don't remember exactly, but I think about $70,000.

Q. In cash?

A. $70,000 in cash, and I think that included the cash required for the purchase of both the Thurston, which we later named the West-End and the Liberty. I think the amount of the purchase was $70,000 cash.

Q. The West-End, you say was acquired as part of the same transaction as the Liberty?

A. Yes, sir.

Q. Now, when the Monroe was acquired, did you participate in the acquisition?

A. Yes, sir.

Q. How much cash was paid for the Monroe?

A. I think $20,000; I am not absolutely sure, but I think it was $20,000.

Q. Now, when the Madison was obtained by your father, the Schine interests were already operating the Riviera?

A. Yes, sir.

Q. And the Liberty?

The Court: What?

Mr. McClennen: And the State and the Webster?

The Court: The Liberty?

[fol. 2485] Mr. McClennen: Yes, if your Honor please.

The Court: When what was acquired?

Mr. McClennen: When the Madison was acquired by Mr. Fenyvessy.

The Witness: I think so.

Q. So that their operation on all four of these preceded any Fenyvessy operation of any of these Madison, Monroe or West-End Theatres?

A. Yes, sir.

Q. In your Madison and Monroe—in your Madison Theatre, did you cut your admission prices as early as 1931?

A. I don't think so; I don't remember.

Q. Do you remember ever cutting the admission prices in those theatres?

A. No, I don't. I think we charged more than before in the Madison Theatre.

Q. That is, you increased the price in the Madison Theatre over what your predecessors had charged, do you mean?

A. Yes, sir, I think so.

Q. And you have no recollection of ever reducing the admission prices at the Madison Theatre?

A. No.

Q. Now, in 1937, you were charging a Saturday afternoon admission price of 10 cents at the Madison, were you not?

A. For children.

[fol. 2486] Q. For children only?

A. 1937, did you say.

Q. 1937; children only?

A. That is my recollection. I am not positive.

Q. I show you a letter of November 16th, 1937, signed by you and ask you whether at that time your Madison Theatre's minimum admission price was 10 cents on Saturday afternoons?

A. Yes, sir, for children.

Q. And at that time the Rivoli Theatre on Saturdays was charging five cents admission?

A. Yes, it appears that way.

Q. You were writing this letter as an argument why you should be relieved from that 5 cent competition, were you not?

A. We didn't like 5 cents in back of us.

Q. And that was the reason you were writing that letter?

A. Yes, sir.

Q. And do you remember why you didn't say that your minimum admission price for adults was 15 cents or 20 cents or 25 cents, whatever it was?

A. Well, I say the minimum admission was 10 cents, and that is what it was.

Q. Yes; you didn't say—you did not refer to children in your argument, did you?

[fol. 2487] A. Well, I do, in referring to the Rivoli, I say 5 cents for children, don't I?

Q. No.

A. What do I say?

Q. Nothing about children anywhere, I will show it to you.

(Document shown to witness.)

A. Well, it probably was so, but I see it doesn't say anything about that.

Q. Do you remember how long your Saturday afternoon minimum admission price at the Madision had been 10 cents on November 16th, 1937?

Mr. Wright: If the Court please, it is hardly on the scope of the direct-examination. If he is putting it in as part of what he conceives to be his case, it bears on nothing I had the witness testify to on direct-examination.

Mr. McClennen: On the contrary, if your Honor please, this witness has testified at length as to reasons why he should have a run as good as the Rivoli and, of course, this bears on whether he should have a run as good as the Rivoli if his minimum admission price was 10 cents.

Mr. Wright: This refers to a five-cent price at another [fols. 2488-2489] house not operated by any of them.

Mr. Clagett: I don't think the Rivoli has been mentioned before.

Mr. Wright: The theatre the witness testified to on direct was the Riviera. This apparently refers to the Rivoli, which was not mentioned in the direct-examination.

Mr. McClennen: I am told I said he was asking for a run as good as the Rivoli. That was not my intention. I meant the "Riviera", and I was interrogating him on the question of how long he had a 10-cent admission price on Saturday afternoons at the Madison as bearing on the question of whether in the ordinary course it would be expected he would be accorded as good a run as the Riviera.

The Court: Will your examination take sometime more?

Mr. McClennen: I should hope not very much more.

The Court: We will adjourn until tomorrow morning at 10 o'clock.

(Whereupon, a recess was taken until Wednesday, October 11th, 1944, at 10 o'clock a.m.)

[fol. 2490] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223

UNITED STATES OF AMERICA,

vs.

SCHINE CHAIN THEATRES, INC., Et Al, Defendants

Continuation of trial before Honorable John Knight, United States District Judge for the Western District of New York, October 11th, 1944, 10 o'clock a.m.

APPEARANCES:

Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schils, Esq., Special Assistants to the Attorney General, and Milton Kallis, Esq., Special Attorney, in behalf of the United States.

Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homans, Esq., and Howard M. Antevil, Esq., appearing for the Defendants.

[fol. 2491] PROCEEDINGS

CHESTER FENYVESSY resumed by and on behalf of the Plaintiff, testified further as follows:

Cross-examination (Continued).

By Mr. McClennen:

Q. Mr. Fenyvessy, in April, 1937, was the Madison Theatre charging 5 cents admission for children on Saturdays?

A. No.

Q. You know that of your own positive knowledge, do you, that they were not?

A. I am refreshed from that letter which says the minimum was 10 cents.

Q. That was in 1937?

A. Yes, sir.

Q. Now, in April, 1935 was the Madison charging 5 cents admission for children?

Mr. Clagett: What was the last date, 1935?

Mr. McClennen: 1935.

Mr. Clagett: Thank you.

The Witness: Not to my knowledge.

Q. Have you any positive knowledge that the Majestic was not charging 5 cents for children's admission for [fol. 2492] Saturday afternoons in April, 1935?

Mr. Rogers: Did you say "Majestic"?

Mr. McClennen: Madison, I misspoke.

The Witness: I don't recall that it ever charged 5 cents.

Q. Do you have any knowledge of a complaint made at that time that the Madison was charging 5 cents admission on Saturdays in April, 1935?

A. Not that I recall.

Q. At page 2288 of the testimony you were asked the fact that you did not contract for Columbia for the 1938-39 season. Did you in September or October 1938 make an offer for Columbia pictures for that season?

A. I don't remember. We bought Columbia each year, but I don't remember that particular——

Q. Did you buy Columbia for the 1938-39 season?

A. I think so.

Q. I call your attention to Exhibit 750, contract dated

June 14th, 1937, approved June 28th, 1937. That is signed by you?

A. Yes, sir.

Q. And the clearance provision, "Second-run, City of Rochester, 14 days clearance over all subsequent-runs", that gave you 14 days over the Rivoli, Liberty, State and Dixie, did it not?

A. Yes, sir.

[fol. 2493] Mr. Clagett: The first would be the Riviera.

Mr. McClennen: Riviera, I am sorry.

Q. And, of course, you understood me to mean the Riviera in your answer?

A. Yes, sir.

Q. Did you seek that clearance?

A. In making the contract, you mean?

Q. Yes.

A. Asked?

Q. Yes.

A. It was offered to us second-run with that clearance, and we paid for that and, of course, we wanted that.

Mr. McClennen: That is all, your Honor.

Redirect examination.

By Mr. Clagett:

Q. Mr. Fenyvessy, I call your attention to Plaintiff's Exhibits Nos. 741 and 742 for the Metro-Goldwyn-Mayer product for the 1937-38 season, date of application June 16th, 1938, approved June 23rd, 1938, and ask you whether that contract was for the old or previous season's Metro-Goldwyn-Mayer product for the Madison and Monroe Theatres?

The Court: The old, what do you mean by that, the present season?

[fol. 2494] Mr. Clagett: You notice, your Honor, that contract is dated in June, 1938. It was for the 1937-38 product and it was also at the same time they bought the 1938-39 product, which was the current product.

Mr. McClennen: Strictly speaking this was a contract for the current season.

Mr. Clagett: I am asking the witness whether the prod-

uct for the 1937-38 season was current or was for current product.

Q. Let me ask you a question, Mr. Fenyvessy——

A. It appears to be. Of course, I didn't make this contract.

The Court: How do you account for the same dates?

By Mr. Clagett:

Q. Not necessarily, your Honor, and Mr. Fenyvessy, what is the date of the application for that product, the date of the application date for that product?

A. June 16th, 1938.

Q. What season's product is covered by that application and that contract?

Mr. McClennen: Just a moment, the contract shows right on its face that it is for the 1937-38 product.

Mr. Clagett: That is right.

Q. Is that correct, Mr. Witness?

[fol. 2495] A. Yes.

Q. Was that product the——

The Court: It is dated when, did you say?

Mr. Clagett: June, 1938.

The Court: For the 1937-38 product?

Mr. Clagett: Yes, your Honor.

Q. In any event, Mr. Fenyvessy, the 1937-38 season had about two and a half months to run at the time that application was made?

Mr. McClennen: Oh, just a moment, that is not only leading but it is obvious that for a third-run it had considerably more time to run than that. That is, it could run perhaps into November of 1938.

The Court: You mean for the balance of the season subsequent to that date?

Mr. McClennen: That is right.

The Court: That is your inquiry?

Mr. Clagett: My inquiry was as to the season, as we speak of seasons.

The Court: Yes.

Mr. McClennen: My objection was that the question is leading and does not take into consideration that the season

for the showing of the later runs extends beyond the release [fol. 2496] season by some considerable length of time.

The Court: I will let him state if he can. I don't know that there is anything on the paper that will show that unless you draw the conclusion from the date itself.

Mr. Clagett: There are two things on the paper which go to show it. I was trying to elicit that from the witness. It is the date of the season and date of the contract.

The Witness: This contract seemed to have been made late, and there are a number of eliminations. Attached to the contract is a list of pictures that are to be eliminated. Therefore, this is only part of the season's output.

Mr. Clagett:

Q. Mr. Fenyvessy, I call your attention to the provision on this contract relating to pictures that have been eliminated and ask you if those pictures had not already been played at the time the contract was—the application was made?

A. Yes, sir, it says so.

Q. How many pictures were eliminated, can you state by referring to the contract?

A. 24, it appears.

[fol. 2497] Q. Are you making the total for the two contracts? My question is addressed to the number of pictures eliminated, we will say from the Madison contract.

A. Well, both houses had the same number of pictures, and the eliminations would be the same because both houses played day and date.

[fol. 2498] Q. Does it have a list of pictures attached to the contract?

A. Yes.

Mr. Clagett: That is all. I would like to read to your Honor this provision in Plaintiff's Exhibits 741 and 742 appearing on the face of the contract for the 1937-1938 season, made in June, 1938. "Pictures on the 1937-1938 contract that have been released to subsequent run theatres that follow this theatre are to be eliminated from this contract based on national designation."

The Court: Why would they make a second contract for these pictures which were eliminated? Normally they would have been released pursuant to a contract prior to this date?

The Witness: The pictures had not been played in this theatre, apparently, and they were eliminated because they had been lost, they had been run in other theatres. The run had been lost.

The Court: Eliminated from what? That is the point.

The Witness: Eliminated from the contract.

The Court: Eliminated from the contract, but there must have been a prior contract which provided for your exhibi- [fol. 2499] tion of those in order for you to eliminate them from a subsequent contract.

The Witness: There was a contract made for this 1937-1938 product, and attached to the contract was an elimination of pictures.

The Court: There must have been another contract bearing the date of the preceding year.

Mr. Clagett: I think I can clear that up, your Honor.

By Mr. Clagett:

Q. Mr. Fenyvessy, the pictures that were eliminated had been played in other theatres other than your own?

A. That is right.

The Court: Did he have a contract for the year before that?

Mr. Clagett: This contract was made at the end of the season, late.

The Court: I understand.

Mr. Clagett: Certain pictures had been played by other exhibitors, and when he made the late contract he picked up the remainder of the pictures that had not been played.

The Court: Metro Pictures?

Mr. Clagett: Metro-Goldwyn pictures.

Mr. Wright: I don't think your Honor understood this elimination provision.

The Court: I see now what you mean.

[fol. 2500] Mr. Wright: I just want to show you.

The Court: The ordinary contract would be for all the pictures of Metro-Goldwyn?

Mr. Wright: This contract, the elimination provision appears on the contract for that season, and the elimination refers right to that contract of which it is a part.

The Court: All it would cover would be Metro-Goldwyn product subsequent to June for the balance of the season?

Mr. Wright: On its face I think it covers such of the Metro-Goldwyn product as had not been then played in subsequent run theatres.

The Court: There is another contract of the same date that might possibly seem to over-lap, because of the overlapping of the season.

Mr. Wright: Then there is a separate contract which is also in evidence here. These contracts made on the same date cover the 1938-1939 season.

The Court: The other only covered from June until the end of the 1938 season—beginning of the 1938 season?

Mr. Wright: Well, plus whatever pictures that had been [fol. 2501] previously released during the season which had not been played in the subsequent run theatres which followed him, and the ones which were eliminated pursuant to the clause are stated in the attached memo.

Mr. McClennen: The contract as a whole shows that this contract of June 16, 1938, was for the entire Metro 1937-1938 product, except those which had already been played in subsequent run houses.

Mr. Wright: That is right.

Mr. Clagett: That is absolutely right.

By Mr. Clagett:

Q. Mr. Fenyvessy, I show you two contracts with Columbia Pictures Corporation for the 1938-1939 season, for the Monroe and Madison theatres, respectively, bearing approval date January 6, 1933, and ask you if you made those contracts for the third run of Columbia Pictures for that season?

Mr. McClennen: Is this an exhibit?

Mr. Clagett: This is not. This is a new contract.

Mr. McClennen: Not yet in evidence. Well, then, I object to the statement of the contract until it is put in evidence.

The Court: Isn't that in evidence?

[fol. 2502] Mr. McClennen: It is not in evidence.

By Mr. Clagett:

Q. Is that your signature on these papers?

A. Yes, 1939.

Q. January 6, 1939.

Mr. Clagett: I would like to offer those in evidence.

Mr. McClennen: You read in the question "1933." You meant 1939?

Mr. Clagett: If I said anything about 1933, I meant 1939. Mark these as the next Government exhibits.

(Two contracts between Fenyvessy and Columbia Pictures Corporation for 1938-1939 season were received in evidence and marked Plaintiff's Exhibits 791 and 792.)

By Mr. Clagett:

Q. I now ask you, Mr. Fenyvessy, whether these exhibits 791 and 792 provide for a third-run of Columbia Pictures for the 1938-1939 season?

A. Yes, third-run.

Mr. Clagett: I believe that is all.

Mr. McClennen: No further questions.

The Court: Next witness.

Mr. Clagett: The next witness I will call is Mrs. Ben Belinson.

[fol. 2503] Mrs. Florence F. Belinson, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Clagett:

Q. Will you state your name and place of residence?

A. Florence F. Belinson, 21 Arnold Park, Rochester, New York.

Q. Mrs. Belinson, you and your husband, Mr. Ben Belinson, operate the Little Theatre in Rochester?

A. Yes.

Q. How long have you operated that theatre?

A. Since April 16, 1931.

Q. Are you the sister of Mr. Chester Fenyvessy, who has testified in this case?

A. Yes.

Q. Were you in the court room yesterday when Mr. Fenyvessy located various down-town and subsequent-run theatres on a map of Mr. McClennen's?

A. Yes.

Q. What is the location of the Little Theatre?

A. 240 East Avenue, Rochester.

Q. Is that down-town?

A. Yes.

Q. Is it near the heart of the main business section or not? [fol. 2504] A. No, it is on the fringe, on the border of the down-town section.

Q. Calling your attention to the years 1931 to 1937, will you state the kind of pictures, the type of pictures, you used at the Little Theatre?

Mr. McClennen: That is objected to as calling for a characterization and altogether too general.

The Court: You don't mean class pictures, you mean type?

Mr. Clagett: That is what I mean.

The Court: The run you don't mean?

Mr. Clagett: I am not thinking of run at the moment, but perhaps I can ask a few direct questions, since Mr. McClennen is objecting.

Mr. McClennen: I suppose you have the contracts right here?

Mr. Clagett: Not for these early years. I don't have any of them, but I think I can develop this without any contracts.

By Mr. Clagett:

Q. Did you play any first-run of the eight major companies in the Little Theatre?

A. Yes, we played occasional pictures that had been eliminated or discarded by the big down-town houses, and seemed appropriate for our type of operation.

Q. Did you play foreign-made pictures?

[fol. 2505] A. Yes, we played foreign language pictures during that period, German, French, Polish, Russian, Jewish, Swedish and British.

Q. Were those pictures released by the British Gaumont?

A. Yes, and others.

Q. Did you play any so-called reissues of the major companies?

A. Yes.

Q. Now, with reference to the same period, that is, from about 1931 to 1937, what was the policy of operation with respect to the number of pictures played and admission prices?

A. We maintained then, as always, a single-feature policy. The program was supplemented with short subjects, and our admission was always within a very small amount of the large down-town houses, our evening admission. Matinees, they had a lower admission than we did.

[fol. 2506] Q. Well, what were the admissions that you charged for matinee and evening?

A. We got 25 cents in the afternoon, 35 cents at night, against Loew's 40 cents at night and they had a balcony 15 cents early bird admission in the afternoon.

Q. The prices you quoted for Loew's applied to the other first-run downtown theatres?

A. I think Loew's and the Palace maintained a competitive price.

Q. Did you ever have any policy of give-aways or bank night?

A. No, the theatre was conducted with very—the policy was appropriate for the clientele that we were reaching, which was a discriminating audience. We never had any added attractions of any type, no give-aways, no dishes, no groceries.

Q. Did you ever put on any programs to stimulate patronage which would appeal to a particular type of patronage?

A. We at all times strive to reach the discriminating audience and gauged our programs as far as possible with that in view. We had cont-acts with institutions, churches and clubs with the idea of securing their co-operation in reaching this type of audience.

Q. What were the admission prices of the neighborhood houses, that is, the first neighborhood run?

[fol. 2507] A. I think the neighborhood houses charged 25 cents at night.

Q. Evening adult admission prices?

A. Yes, sir.

Q. With reference to the period about 1936 or 1937, did you, or were you able to license a sufficient amount of the kind of product that you have described?

Mr. McClennen: That is objected to.

The Court: I will let her state the facts, that is in comparison to what they had had.

The Witness: All right?

Q. Yes.

The Court: The question is not quite correct in form. State whether there were sufficient of what you had before and could get again.

By Mr. Clagett:

Q. Did you have difficulties in licensing an adequate number of the type of pictures that you have described?

Mr. McClennen: That is objected to as leading. It is competent to state what they did.

The Court: It really calls for a conclusion. That was the difficulty before. State what was done, what efforts were made to secure pictures.

Q. Was there any change in about 1936 or 1937 with [fol. 2508] respect to the availability to you, that is, your opportunity to purchase or license the pictures of the type that you have described?

Mr. McClennen: That is objected to as leading.

The Court: The same objection as before. State what was done with reference to that and what the results of those efforts were, what happened, I mean.

Q. Mrs. Belinson, calling your attention to the period of about 1936 to 1937, would you describe the efforts that you made to license the type of pictures that you have described?

A. The unrest in Europe had affected our ability to secure the foreign language product that we had been supplied with up to that time and Gaumont—British people who had been supplying us with first-run with their output about that time went out of exhibition business in this country, and that left us with nothing except reissues or old pictures which meant after a picture had played in every house in town, including the 10-cent houses and theatres that gave away groceries, bingo and everything else, we were forced to use that product as our only source of product and still maintain the house as a high-class downtown theatre charging 35 cents. Naturally we could not expect to [fol. 2509] maintain the house as a high-class house with a low-class product in the business. It is old to the public and it was practically worthless, so we looked around to see what else we could get.

Q. Mrs. Belinson, will you state what product the Loew's Rochester Theatre used first-run, downtown first-run?

A. Metro, Columbia and United Artists practically.

Q. Did that product have a second-run or a continued or hold-over run in any theatre downtown?

A. No.

Q. Did the Paramount product have a continued or second-run downtown?

A. Yes, sir.

Q. Did the R.K.O.?

A. Yes, whatever pictures they wished to hold over, they had a house to hold them over in.

Q. Did the Warner?

A. Yes, sir.

Q. Did the Fox?

A. Yes, sir.

Q. Did the Universal?

A. Yes, sir.

Q. I believe that you testified that Mr. Chester Fenyvessy, who has testified in this case, was your brother?

A. Yes, sir.

[fol. 2510] Q. Were you aware of the fact that for the 1936-37 and 1937-38 season, he had a second-run of Columbia product for the Madison and Monroe Theatres?

A. Yes, sir.

Q. For the period indicated did you obtain a concession from your brother to enable you to play selected pictures from the Columbia day and date with the Madison and Monroe Theatres?

A. Yes, sir.

Mr. McClennen: That is objected to as nothing to do with this case and leading and calling, I would think, for the contents of some writing.

The Court: In the first place, was there any writing?

The Witness: Are you asking me?

The Court: Yes.

The Witness: Yes, there were contracts covering the question Mr. Clagett asked.

The Court: Why, what you seek to inquire is whether he gave her part of his run, you say?

Mr. Clagett: She naturally bought and paid for a run, but she was able to buy them on a run day and date. I think I can——

The Court: Is that what she bought, bought it from whom?

Mr. Clagett: Bought it from Columbia pictures.

[fol. 2511] The Court: All right, show what she got and what she ran.

Q. Mrs. Belinson, did you license certain Columbia pictures on a run which was day and date with the Madison and Monroe?

Mr. McClennen: That is objected to. Mrs. Belinson has said there were contracts and if this is at all important we ought to have the contracts. Furthermore, it has nothing to do, I submit, with this case.

The Court: Just what bearing has it?

Mr. Clagett: Your Honor, I would like to show that Mrs. Belinson played eight or ten Columbia pictures in the 1937-38 season day and date with the Madison Theatre, which was at the time the Madison and Monroe had the second-run of Columbia pictures. I think I have the contracts for each of those individual pictures, but I was trying to avoid cluttering up the record with these individual contracts, seven or eight contracts.

The Court: What is the materiality of the inquiry?

Mr. Clagett: I want to show that she was able at one period, when the Columbia pictures had been licensed second-[fol. 2512] run to Mr. Chester Fenyvessy, for exhibition on Rochester, she could obtain the privilege or right to play those pictures day and date with the first neighborhood runs, but that starting in 1938-39 season, when Schine licensed the Columbia product second-run, that she could not license those pictures day and date with the Schine houses. That privilege was denied to her.

The Court: Well, you mean by your statement that in order to get the second-run she had to get a release or consent from the brother who had the second-run for the pictures?

Mr. Clagett: I do not, I cannot say she necessarily had to have the consent, but she did in any event in that period obtain the privilege or the right to license certain selected Columbia pictures. That right was subsequently——

The Court: Let us have the contracts.

Mr. McClennen: Mr. Clagett, if you are going to put those in, couldn't they be marked as exhibits without the preliminary of identification?

Mr. Clagett: They could be.

Mr. McClennen: Before you refer to them.

[fol. 2513] Mr. Clagett: If you concede that, after looking at them—if you want to look at them we will just mark them.

Mr. McClennen: These all appear to be genuine and our only objection we preserve is as to any materiality in this case.

The Court: Mark them.

(Thereupon Columbia contracts referred to were marked as Plaintiff's Exhibits 793 to 799, inclusive, in evidence.)

The Court: Do they all relate to Columbia or different companies?

Mr. Clagett: They are all Columbia.

Q. I call your attention to Plaintiff's Exhibit 793, and ask you whether that is a contract for three pictures which you made with the Columbia Pictures Corporation for second-run exhibition at the Little Theatre in Rochester?

A. Yes, sir.

Q. And you played those pictures second-run or day and date with the Madison and Monroe?

A. Some of the pictures we had straight second-run ahead of the Madison and Monroe. I think these three were straight second-run.

Q. Will you read the names of those pictures off the [fol. 2514] contract?

A. "Craig's Wife", "Theodore Goes Wild" and "Pennies From Heaven".

Q. Does that contract have any provision on its face with reference to run?

A. No.

Q. But you did play those pictures?

A. Yes, sir.

Q. The way you state?

A. Yes, second-run.

The Court: First-run?

The Witness: No; second-run.

Q. I show you Plaintiff's Exhibit 794, and ask you whether you played the pictures indicated on that contract second-run or day and date?

A. Yes, sir.

Q. What does the contract provide?

A. It provides for second-run.

Q. What is the name of that picture?

The Court: If you want parts of the exhibit, you can save time.

Mr. Clagett: I would be glad to do that. I was trying to bring out from the witness herself that these pictures had been played in this manner.

[fol. 2515] The Court: I don't want to destroy your purpose, but I am anxious to save time.

Mr. Clagett: Plaintiff's Exhibit 794 is a Columbia contract for the picture "When You Are in Love" with the provision, clearance provision "Second-run, Rochester, New York."

Exhibit 795 is a Columbia contract for the exhibition in the Little Theatre of the picture "Holiday," and run provision as follows: "Second in Rochester." If held over for a second week—strike that out, please, we have difficulty reading this to make the meaning clear. "Second-run Rochester. If held over for a second week percentage terms to be 25 per cent of the gross."

The next exhibit is 796, a contract with Columbia Pictures Corporation for the exhibition of the picture "The Awful Truth" at the Little Theatre. Provision with reference to clearance, "Second in Rochester starting January 1, 1938 and day and date with Strand, Madison and Monroe. If held over for a second week percentage terms to be 25 per cent of the gross. Above to include four single [fol. 2516] reels."

The Court: How long did the contract provide those two theatres should have the second-run? They could not give the same right to two, the picture rights or the same right, it would be the only contract providing for the appearance.

Mr. Clagett: If the distributor is selling his picture, I believe he can sell simultaneous runs, that is, day and date runs, if he is so minded.

The Court: I was referring to the contract by virtue of the clearance provision, that is all. Go ahead. What made my inquiry pertinent is your statement or part of the question relating to some concession of the brother's. You said something about that earlier, that it was with the consent of her brother.

Mr. Clagett: I did ask that question. I would be very happy to have the witness state just what that was. It was objected to.

The Court: I know that the company has the right to give the same runs to different companies, and now you indicate that the second-run was to be given to the Madison, Monroe

[fol. 2517] and Strand and also given to the witness' company, which was done with the consent of the management of the Strand, Monroe and Madison.

Mr. Clagett: Your Honor, I thought your question was about an abstract one, as to whether a distributor could sell simultaneous runs.

The Court: Well, you could, unless something limits the purchaser, whether there was a limit here. The question here is whether it was a straight out and out second-run to two different companies.

Mr. Clagett: The contracts already in evidence state that the Madison and Monroe did have the second-runs for this season. I simply want to bring out she did obtain the right to play these pictures with the consent of Mr. Fenyvessy.

The Court: That is the point, whether there had to be that consent or not. You say in one breath that he consented to the contract to two different companies for second-run. On the other hand, you say in this case she had to have the consent. Go ahead.

[fol. 2518] Mr. Clagett: The next exhibit is Plaintiff's Exhibit No. 797 for the exhibition of the picture "Lost Horizon" at the Little Theatre, with the provision with reference to clearance, "Second-run in Rochester for the 19th and 20th of November, and a day and date with Strand, Madison and Monroe, beginning November 21, 1937."

By Mr. Clagett:

Q. Can you recall, Mrs. Belinson, whether you played any additional pictures, Columbia pictures, on the same run than the ones I have indicated from these contracts?

A. Yes.

Q. Can you name those pictures?

A. I don't believe you mentioned, "Mr. Deeds Goes to Town"—"You Can't Take It With You"—"Mr. Smith Goes to Washington."

Q. Did you play a picture entitled "The Awful Truth" from Columbia?

A. Yes, you mentioned that one.

Q. The next exhibit is Plaintiff's Exhibit 798 for the exhibition of the picture, "You Can't Take It With You," clearance as follows, "Picture to open up and play day and date with Schine's Riviera, State, Dixie and Liberty on November 24, 1938."

[fol. 2519] The next is Plaintiff's Exhibit 799, for the exhibition of the Columbia picture, "Mr. Smith Goes to Washington," clearance provision, "Second day and date with Riviera, State, Dixie and Liberty."

With reference to those last two pictures, "You Can't Take It With You" and "Mr. Smith goes to Washington," you played those after the Schine houses?

Mr. McClennen: Just a moment.

A. Played them second-run with the Schine houses.

Q. Second-run with the Schine houses. Were you aware of the fact, Mrs. Belinson, that your brother's second-run contract with Columbia Pictures terminated?

A. Yes, sir.

Q. And that subsequently the Monroe, Madison and West End and Liberty theatres were sold to Schine?

A. Yes.

Q. Can you state whether the exhibition of these pictures indicated in these contracts at the Little Theatre was successful?

Mr. McClennen: That I object to.

The Court: Read the question.

(Question read.)

The Court: What is the purpose of that?

Mr. Clagett: I merely want to show this product was desirable, this run and type of product was highly desirable [fol. 2520] for the Little Theatre, if it could have continued to obtain certain pictures. That it was highly desirable to continue to show such pictures.

The Court: There must be some way of comparison with the pictures.

Mr. Clagett: I don't want to make a general comparison. I will ask the witness this question.

By Mr. Clagett:

Q. Did these pictures make money for the Little Theatre?

A. Yes, some of them did.

Q. Not all of them?

A. Some of them were sensational and some were average.

Q. All of them were played on percentage terms?

A. Yes.

Q. Can you recall what the percentage terms were?

Mr. McClennen: Isn't it right in the contract?

The Court: They are all on the same percentage?

The Witness: They were not all 25.

The Court: These particular ones were?

The Witness: No.

Mr. Clagett: Let us see what the contracts say. Exhibit 793 shows pictures thereon, 25% of the gross. Exhibit 794 shows pictures thereon, 25% of the gross. Exhibit 795 shows [fol. 2521] pictures thereon, 30% of the gross. Exhibit 796 shows pictures thereon, 30% of the gross. Exhibit 797 shows pictures thereon, 40% of the gross.

The Court: It appears there is some difference.

Mr. Clagett: There is some difference as to the amount of percentage. Exhibit 798 shows pictures thereon—no, flat rental $300.

The Witness: No, guaranteed $300. Never had a flat rental.

Mr. Clagett: $300 against a guarantee of 40% of the gross. Exhibit 799 shows a rental of $300 against 40% of the gross.

By Mr. Clagett:

Q. The contract indicates that "Mr. Smith Goes to Washington" was the last of the Columbia Pictures that you had played in this series?

A. Yes.

Q. Did you make efforts to license any additional Columbia Pictures second-run or day and date with the Schine houses?

A. Yes.

Q. Can you tell with whom you had any conversation on on the question of licensing further Columbia Pictures?

A. The salesman in the territory. His name was Bullwinkel.

Q. You had previous dealings with him over a period of years?

[fol. 2522] A. Yes.

Q. Can you state any particular picture you had in mind?

A. The next big picture that we were interested in—we were selecting only particular pictures that we could use—the next big picture was one called "His Girl Friday."

Q. Did Mr. Bullwinkel take an application from you for that picture?

A. No.

Q. Did he state why he would not?

Mr. McClennen: That is objected to.

The Court: Overruled. State what you said to him and what he said to you.

Mr. McClennen: The usual objection.

The Court: State what the talk was.

The Witness: He told us that he was unable to serve us any further with this second-run day and date with the Schine houses.

By Mr. Clagett:

Q. I believe you have testified that the M.G.M. product was played at the Loew's Rochester Theatre and did not receive a second-run in any down-town theatre?

A. Yes.

Q. Did you attempt to license the M.G.M. pictures on a second-run or day and date with the Schine houses?

[fol. 2523] A. Yes.

Q. Can you state whether you had any conversation with any representative of Loew's with reference to licensing the M.G.M. pictures, second run?

A. Yes, many conversations.

Q. Over what period was that?

A. During the time we were playing second run Columbia.

Q. Well, can you state with whom you had such conversations?

A. With the branch manager and the salesmen, Mr. Maw and Mr. Weisman.

Q. Who was the branch manager?

A. Mr. Maw.

Q. Who was salesman?

A. Mr. Weisman.

Q. Did Mr. Maw come to Rochester or would you see him in Buffalo?

A. No, he was the salesman in the Rochester territory and he called on us frequently at our office.

Q. You say Mr. Maw was the salesman?

A. Mr. Weisman was the salesman.

Q. He called on you?

A. He called on us frequently.

Q. Did Mr. Maw call on you?

A. Rarely. He has been in the office, but not often.

Q. Did your husband, Mr. Belinson, ever go to see either—[fol. 2524] did he go to Buffalo and see Mr. Maw at any time?

A. Yes, occasionally.

Q. You have stated Mr. Weisman called on you at the Little Theatre in Rochester?

A. Yes.

Q. Will you state what you said to him with reference to obtaining M.G.M. pictures second run?

Mr. McClennen: Objected to in general and because there is no date or approximate date.

The Court: Overruled.

Mr. McClennen: The date?

The Court: Can you specify the date?

Q. Mrs. Belinson, can you fix, to the best of your recollection, the date or dates that you talked to Mr. Weisman?

A. During the period we were playing second run day and date with the four Schine houses we had frequent conversations. I presume that was 1938-1939.

Q. Can you tell, in substance, then what you said to him, we will say, on the first occasion that you tried to license Metro pictures second-run?

Mr. McClennen: Objection.

Q. And when that would be, as near as you can recollect?

A. I would say 1938. What I said on any particular date I don't know. What I said over the course of years was we presented our problem to him, that we needed product, [fol. 2525] and we had established the precedent of playing second-run Columbia product day and date with four Schine houses, and if Columbia could do it we thought maybe Metro could do it, too, and the fact that we were a downtown house, charging high admissions, single-feature policy, and in no way competitive with any neighborhood house, and that the thing—the policy had been welcome to everybody when we were playing Columbia. We tried to establish the same thing with Metro.

Mr. McClennen: Now that your Honor has heard that, I move that it be stricken out.

The Court: I think it is not responsive to the question.

The Witness: He asked me the conversation.

The Court: Strike it out. You can state the substance of what you said to him.

The Witness: We asked for second-run product to be played at the Little Theatre day and date with the four Schine houses.

The Court: What did he say?

The Witness: He said he would take it up with his superiors and we in turn should present our problem to the New York office, that he was not the last word, but that he would act as the go-between and present the problem, and [fol. 2526] we, in turn, should also present it in detail to the New York office.

Mr. Clagett: Are you satisfied to have these marked in evidence?

Mr. McClennen: Mr. Clagett has just shown me several letters. We object to their admissibility, but concede that they are what they appear to be.

The Court: Purported to be between——

Mr. McClennen: Between the witness and Metro.

The Court: The head office, you mean?

Mr. McClennen: Head office, yes. Mr. Rodgers, to be more specific.

Mr. Clagett: Mark these as the next Government's exhibits.

(Three letters, from Mrs. Ben Belinson to Mr. William F. Rodgers, dated October 4, 1938; letter from Mr. Rodgers to Mrs. F. F. Belinson, dated October 9-39, and letter addressed to Mr. Belinson, from E. K. O'Shea, dated September 12, 1940, received in evidence and marked Plaintiff's Exhibits 800, 801 and 802, respectively.)

Mr. Clagett: I would like to read this letter, your Honor. Starting with the first one: Letter from Mrs. Ben Belinson to Mr. William F. Rodgers, Loew's, Inc., New York City, dated October 4, 1939: "Dear Mr. Rodgers: We have spoken to your Mr. Maw regarding our desire to show [fol. 2527] some of your product second-run day and date with your second-run Rochester account. That you may more clearly understand the local situation, we present herewith certain facts for your consideration. The Little Theatre operates daily from 1 to 11 P. M. Admission is 25 cents for matinees and 35 cents evenings for adults; 15 cents at matinees and 25 cents evenings for children. Our policy is single features exclusively. Each program plays a minimum of seven days. Occasionally features are

held over indefinitely. We have no premium nor gambling nights. Since our opening in 1931 we have never deviated from this policy. Due to our down-town location, single feature policy and high admission, 35 cents for one feature as against 40 cents, the highest admission in Rochester for double features, we in no way interfere with second-run theatres located in neighborhoods five miles from the Little Theatre, not connected with our locality by bus or street [fol. 2528] car. The second-run houses are open evenings only, excepting on Saturday and Sunday, charging 25 cents for adults and 10 cents for children, present double bills entirely, have various gambling and premium nights. Furthermore, we would select mainly the type features which usually attract little patronage in neighborhood theatres. We cater to an entirely different clientele, an exclusive and discriminating patronage. Columbia Pictures Corporation served us with several of their outstanding releases. Among them were 'The Awful Truth,' 'Theodora Goes Wild,' 'Lost Horizon,' 'Pennies From Heaven,' the Grace Moore features, and 'You Can't Take it With You.' Some were played second-run day and date with Fenyvessy houses, others second-run day and date with Schine houses. That the results were highly satisfactory to Columbia you can no doubt readily verify. May I suggest, therefore, that you give this matter serious thought? This account unquestionably would develop considerable [fol. 2529] additional revenue for Metro. In fact, having had no experience of any importance with the house, you would be agreeably surprised at the results, with suitable second-run product. This revenue could be produced without interfering in any way with any of your other Rochester accounts, as this theatre is in a class by itself.

Trusting we may hear from you regarding this matter at your convenience, I am," signed.

Exhibit 801 is a letter which appears to be signed by Mr. W. F. Rodgers, on the stationery of Metro-Goldwyn-Mayer home office. It says "Office of W. F. Rodgers, October 9, 1939. Mrs. F. F. Belinson, Little Theatre, Rochester. Dear Madam: We acknowledge your letter of October 4th, and the matter of availability of your pictures is a subject with which our Mr. Ralph Maw, at our Buffalo office, is familiar, and we have referred your letter to him. You will hear from him in regard thereto, and when our

[fol. 2530] representative is next in Rochester he will communicate with you direct. Thanking you for your communication, we are."

By Mr. Clagett:

Q. Mrs. Belinson, can you state whether after October 9, 1939, you had any further contacts with Mr. Maw or Mr. Weisman with reference to obtaining the second-run pictures of Metro?

A. I don't remember any particular conversations. We talked on the subject whenever we got a chance.

Mr. McClennen: I judge that the reading of this group of exhibits is completed?

Mr. Clagett: It is not. I will complete it in just a moment. I want to ask the witness one other question.

Mr. McClennen: If we are going from the letters, now that you have heard these letters, we move that they be stricken out and the contents of them be stricken out.

The Court: Denied.

By Mr. Clagett:

Q. Mrs. Belinson, I show you a copy of a letter signed "Ben Belinson," addressed to Mr. E. J. O'Shea, Metro-Goldwyn-Mayer Pictures, New York City, dated Septem-[fol. 2531] ber 12, 1940, and ask you if that is a letter—if you recognize that copy of a letter?

Mr. McClennen: Is this in evidence?

Mr. Clagett: No.

A. Yes.

Q. You state that various contacts with salesmen and representatives of Loew's were made by your husband, Mr. Belinson, as well as by yourself?

A. Yes.

Mr. McClennen: That is objected to.

The Court: Of course, unless she has personal knowledge she could not testify to that.

Mr. McClennen: May that go out?

The Court: Yes. She can state what she personally knows about it.

By Mr. Clagett:

Q. Did Mr. Belinson ever go to Buffalo or New York to see any representatives of Metro-Goldwyn-Mayer?

A. Yes, he went to Buffalo and New York offices regarding this matter.

Mr. McClennen: That is objected to.

The Court: I don't know how she could tell unless she was with him.

The Witness: I was in town with him.

The Court: In New York and Buffalo?

[fol. 2532] The Witness: Yes, and I saw him start and saw him come back.

The Court: I will let it stand.

Mr. McClennen: This letter I have not seen.

Mr. Clagett: It is almost a duplication of one she wrote.

Mr. McClennen: I still like to see it before you mark it.

The Court: You say your husband is still active in the business?

The Witness: Yes.

The Court: In operation?

The Witness: Yes.

Mr. Clagett: I don't think I will offer that last letter. I will just show it to Mr. McClennen, but I am going to read Plaintiff's Exhibit 802, addressed to Mr. Ben Belinson, Little Theatre, Rochester, New York, dated September 12, 1940, on the stationery of Metro-Goldwyn-Mayer, office of E. K. O'Shea. "Sorry that I missed you when you were in New York, but I received your wire at Gloversville, N. Y.

You know for a number of years we have sold our second-run account in Rochester to the Schine interests. In fact, we have just negotiated another contract with the Schine [fol. 2533] interests for their subsequent run theatres in the city of Rochester, and therefore we will be unable to offer you the run of our pictures in Rochester which you would like to have. It is the policy of our Company, as you know, to continue to solicit our present accounts in all situations.

With kindest regards to Mrs. Belinson and yourself."

The Court: Do I understand that Schine did have the first-run in part of its theatres in Rochester?

Mr. Clagett: At this time they had first neighborhood run, that is the second run.

The Court: That is what what I mean.

By Mr. Clagett:

Q. Mrs. Belinson, will you state whether you had any conversation with any representative of United Artists with reference to licensing the pictures second-run for the Little Theatre?

A. Yes.

Q. With whom did you have such conversation or conversations?

A. Mr. Lehman, the branch manager.

Q. From Buffalo?

[fol. 2534] A. Buffalo Branch.

Q. Can you fix the time of your conversation with him?

A. 1938 or 1939, while we were playing Columbia Pictures. Maybe 1940. While we were playing Columbia second-run. 1939, I guess it was.

Q. Will you state the substance of your conversation with Mr. Lehman? What did you say to him?

A. We asked him for second-run product——

Mr. McClennen: The usual objection.

The Court: Overruled.

A. We asked him for second-run product, second-run day and date with four Schine houses.

Q. What did he say to you?

A. He said he would like our business, he would like the additional revenue, that he knows our account would produce, and he would—he suggested that we present the matter to his home office clearly, so that they could understand it. They never had seen the theatre, did not realize that it was a down-town house of high standing, and he also suggested that we contact Mr. Schine on the matter because he said without such a contact that he did not think they could accomplish anything—without our getting some concession from Mr. Schine he did not think they could serve us.

Q. Do you recall whether you and Mr. Belinson made a [fol. 2535] trip to Gloversville to see Mr. Schine?

A. Yes, we did.

Q. Can you fix the date of that trip?

A. It was in the summer, because we drove. I think it was about July, 1939, at the time we were playing Columbia Pictures.

Q. I hand you a copy of a letter signed by Mr. Ben Belinson, dated July 5, 1939, addressed to Mr. J. M[illegible]r

Schine, and ask you if that refreshes your recollection as to the date that you made that trip?

A. Yes, that was the time.

Q. Did you meet Mr. Schine at Gloversville?

A. Yes, in reply to that letter Mr. Schine made an appointment with us and we went to Gloversville and had a conference with Mr. Schine at his office.

Q. What did you say to him?

A. We told him we would like second-run product on Metro and United Artists, to play day and date with four Schine houses, same as we played Columbia.

Q. Did you explain anything to him about the type of pictures you wanted?

Mr. McClennen: Just a moment. What she said, I submit.

The Court: Yes, state the conversation.

A. We asked for second-run product to be played day and date with four Schine houses, and we explained to him [fol. 2536] we did not want to play the entire output of either company, but wanted only certain selected pictures that were appropriate for our type of clientele.

Q. What did Mr. Schine say to you?

A. He said that means we pick out only the best pictures.

Q. What did you say to that?

A. I said that is—what is best for one is not necessarily best for the other. What is best for the Little Theatre is usually pictures called "Poison" in box offices in the neighborhood houses. Pictures like "Romeo and Juliet," appropriate for our clientele, is the type of picture the neighborhood clientele does not go for in a big way, and that would be the pictures we would pick out.

Q. What did Mr. Schine say further?

A. He said no. The answer to everything was no. The end of it was no.

Mr. McClennen: That, if your Honor please, I ask to have stricken out.

The Court: That he said no may stand.

Mr. McClennen: We don't know what the "no" is applied to.

The Witness: No, we could not have second-run product day and date with four Schine houses.

Mr. McClennen: If that is all it is, why, then, no objection.

The Court: I will let it stand.

[fol. 2537] Q. I believe you testified a moment ago Mr. Sid Lehman also suggested you take it up with the home office of United Artists?

A. Yes.

Q. Did you subsequently have any written communications with United Artists?

A. Yes, we wrote to the home office on the same general——

Q. Do you have copies of any letters which would indicate the dates upon which you wrote to the United Artists?

A. Have I letters? I will have to look. 1939.

Q. What is the month?

A. September and October, 1939.

Q. Whom did you write to?

A. To whom?

Q. To whom.

A. We wrote to Sid. Lehman in the Buffalo office and to Harry Gold in the New York office.

Q. Did you ever succeed in obtaining any of the United Artists pictures, second-run?

A. No.

Mr. McClennen: That is objected to.

The Court: The question now is whether they got any.

Mr. McClennen: There would be no objection to that. "Succeeding in getting" we submit calls for a conclusion. [fol. 2538] If all that is meant is that they did not get any United Artists pictures there is no objection to that statement, but I object to the particular question.

The Court: Let the answer stand, that they did not get any United Artists pictures.

Q. Mrs. Belinson, did you have any contact or negotiations with 20th Century-Fox for any pictures in the summer of 1944?

A. Yes.

The Court: 1944?

Mr. Clagett: Yes, your Honor.

Mr. McClennen: 1944?

Mr. Clagett: 1944.

Q. What picture did you have such negotiations with reference to?

Mr. McClennen: This, if your Honor please, would violate the assurance given that we were not going beyond May, 1942, and we object to it.

Mr. Wright: There wasn't any assurance given except we would not in this case undertake to prove violations of the Act during the period that the temporary order was in effect. That order, as I understand it, ceased to be in effect [fol. 2539] when we started this trial. The period that he is covering is subsequent to the time we started the trial here, and we certainly would expect to show at any time in this suit anything that comes to our attention during the progress of the trial which we regard as supporting our case. We would not hesitate to offer evidence on it and there has never been any assurance given that we would not do so.

[fol. 2540] Mr. McClennen: The record speaks for itself. We had confidence in the language used in the record, and we urge that in view of it, an effort made after the trial of this case started on May 31, 1944, is not consistent with a fair, liberal carrying out of the statement made in the record, and we object to this on that ground and on the ground that it is not material to any issues made in this case. The pleadings set forth no conduct after May 31, 1944, and there ought to be no evidence, we submit, on that account, also.

Mr. Wright: Well, as to the second objection, I suppose a supplemental complaint may always be filed to cover such incidents as have occurred since the filing of the prior pleadings.

Mr. McClennen: There is no supplemental pleading.

Mr. Wright: It is a purely formal objection.

Mr. McClennen: It is a very substantial objection. The reason for pleadings are to give the adversary notice.

The Court: There have been no supplemental pleadings.

Mr. McClennen: There have been no supplemental plead-[fol. 2541] ings. We never heard until this morning that there was any possibility of any such claim at this time.

Please do not interrupt me, even by a start, until I have got through with what I am going to say.

The Court: Proceed.

Mr. McClennen: We have not been advised by any pleadings or in any other way of any purpose which would give

us any occasion for preparation or anything such as this. It is not a formal objection that no supplemental pleading has not been filed. If one is to be filed, we can then address your Honor on whether it should be permitted to be filed in this case at this time.

Now, what was said on page 41 of the opening, counsel for the Plaintiff said that no evidence of conspiracy would be offered after May 19th, 1942. We believed that that was the situation, and we proceeded on that assumption.

Mr. Wright: If the Court please, that statement was amplified at length, and it was made perfectly clear that [fol. 2542] what we were referring to, and the basis for not offering in evidence subsequent to that period that was mentioned, was that there was a temporary order in effect that we presumed prevented violations during the period that it was in effect. The pleadings now on file just contain a violation of the act by the defendants. That is the theory, I suppose, on which we are seeking the injunction here, is that unless enjoined the illegal practices that are being shown would continue. Now, if counsel concedes that our position with respect to the continuance of the violation would not be prejudiced by not offering any proof as to what has happened since the restrictions of the order expired, then I don't suppose that there would be any occasion for going into these incidents that occurred since the trial was in progress but I want to be understood at this time.

The Court: I don't know why counsel for the defense would not make that concession.

Mr. McClennen: We concede only that we were assured by counsel for the plaintiff——

The Court: Counsel, just a moment. You are not speak- [fol. 2543] ing on the subject of this offer to concede the fact that the production of this testimony and the fact that no proof has been made subsequent to May, 1942, does not prejudice the Government.

Mr. McClennen: I was about to address myself on that.

The Court: Is there any reason why the defendants cannot do that?

Mr. McClennen: There is no reason why the defendants should not make this concession which I am about to make, which is that it will not be claimed that the plaintiff's case is prejudiced by its carrying out its statement that it would offer no evidence on conspiracy after May 19th, 1942.

The Court: Why put in that clause in that way, why not say "By the introduction of any evidence prior to May, 1942. The language of the last clause would give rise to thought. What do you say about that, Mr. Wright?

Mr. Wright: The statement is highly objectionable, of course, in reference to an agreement or an alleged agreement that we say was made, we are simply willing to state that it may be understood there may be no prejudice to the [fol. 2544] Government resulting from failure to offer any evidence of violations after May, 1942, then we are agreeable to not submitting or offering such evidence.

Mr. McClennen: We concede that under the circumstances the case of the Plaintiff is not to be prejudiced by the failure to offer evidence of any transactions after May 19th, 1942.

The Court: Under the circumstances, will that meet your purpose?

Mr. Wright: I don't know quite what he has in mind, by "under the circumstances." If there is some catch that isn't apparent to me——

The Court: The words do not make much difference.

Mr. Wright: If he includes under all the circumstances of the case, I don't see any objection. It might be he has something in mind that wasn't apparent to me. What did you have in mind by the reference to circumstances?

Mr. McClennen: The circumstances of the case.

Mr. Wright: That is all.

The Court: Well, I don't know that it would have hurt to have let that clause out, but I don't think it would make any difference, as to what the pleading has to be under the cir- [fol. 2545] cumstances.

Mr. Wright: I suppose that is true. I don't know that it makes any difference as to any stipulation here.

The Court: Very well, we understand each other.

Mr. Clagett: In view of that stipualtion we won't proceed to offer this additional testimony relating to 1944, and that is all of the direct examination.

Cross-examination.

By Mr. McClennen:

Q. Mrs. Belinson, in your experience, in the light of your experience, if the picture "Mr. Deeds Comes to Town"— I hope I have the title,

A. "Mr. Deeds Goes to Town."

Q. "Mr. Deeds Goes to Town" were played at the Little Theatre in Rochester, do you think that it would have any effect upon the attendance coming to the Little Theatre in Rochester that might otherwise go to other theatres in Rochester?

A. I don't understand your question.

Mr. McLennen: Well, will you read the question?

(Question read.)

The Witness: I still don't quite understand it. If it [fol. 2546] played at our theatre does it affect other theatres?

The Court: That particular picture, would it affect other theatres?

The Witness: In the light of our experience, what we play doesn't make any difference to anybody else, because we are in a class by ourselves, charging a high admission, and giving a short show.

Q. Was your clientele such that if you did not play the picture "Mr. Deeds Goes to Town", your clientele wouldn't go to see it at all?

A. I can't tell you that, I don't know.

Q. What?

A. I don't know if I didn't play it whether they would go some place else to see it.

Q. Yes.

A. Some of them would and some wouldn't, some of them would wait and see it probably, and some of them would go and see it where they could see it.

Q. You would expect quite a number to see it somewhere else, wouldn't you?

A. I can't say.

Q. I wasn't asking your knowledge, I was asking your expectation.

[fol. 2547] A. I say lots of people would go elsewhere.

Q. To see the picture?

A. Yes, sir.

Q. And that would apply in the same way to many outstanding pictures of any producer, wouldn't it?

A. We have only 299 seats, and we could not take everybody if they would come. They would go elsewhere, yes, sir.

Q. Now, my question was, you having answered about "Mr. Deeds Goes to Town", that would apply to any other outstanding picture?

A. Yes, sir.

The Court: What is the closest theatre to your theatre?

The Witness: Regent.

The Court: That is where?

The Witness: The Regent is at 65 East Avenue, and we are at 240 East Avenue, but the Regent is a chainhouse, belonging to Paramount, and plays first-run.

By Mr. McClennen:

Q. Your policy, if you could put it into effect, was to select the outstanding pictures for your Little Theatre?

A. Yes, sir.

The Court: Is there anything further? Next witness.

Mr. Clagett: Were you through with Mrs. Belinson? [fol. 2548] Just a moment, please.

By Mr. McClennen:

Q. As you were experienced in the motion picture business, was a picture like "Mr. Smith Goes to Washington" one that would be apt to attract people in the neighborhood of Rochester?

A. Yes, sir.

Q. And that would be true of many of the pictures, which you desired to select and play?

A. Yes, some of the pictures would be so big that they would be big enough for everybody to get their share of revenue from.

Q. That perhaps answers it, but it seems to amplify it quite a little. To put it very specifically, many of the pictures which you wished to select for the Little Theatre would be pictures which would attract large patronages in the neighborhood houses, is that correct?

A. I would say some rather than many, and I would say the pictures that would attract—that I would select would be pictures that would attract business, yes, both in the neighborhood and out.

Q. And do you bear in mind any picture that you wished to select for the Little Theatre that would not be apt to attract attendance in the neighborhood houses?

[fol. 2549] A. In name from any company?

Q. Any picture, any particular picture?

A. Yes, sir.

Q. Which one?

A. "Romeo and Juliet," "Marie Antoinette" I understand were not box office attraction in neighborhood theatres, but were made to order for our clientele.

Q. Can you think of any others?

A. I think "Mid-Summer Night's Dream" was a picture made to order for our clientele, and I don't think any picture——

Q. I am asking you for names.

A. There are three names.

Q. Can you think of any others?

A. Offhand, no.

The Court: What pictures did you show in 1938-39 down to May, 1942.

The Witness: We had been forced to play the last run in town, pictures that had been played in every theatre in Rochester, and sometimes twice in every theatre in Rochester, and we are today maintaining the house on that run.

The Court: I mean, down to 1942?

The Witness: During all that period, since that Columbia [fol. 2550] contract was finished, we run that way.

Mr. McClennen: May that be stricken out in so far as it relates to anything after May, 1942?

The Court: Yes, strike out the reference to anything after May, 1942.

[fol. 2551] Paul Paulvin a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Mr. McClennen: If your Honor please, in order that we might prepare for the days to come, we were furnished with a list of witnesses to prepare for that was given us on Monday in a written memorandum. It was revived by a telephone call last night and we have no indication that this witness was to be called today, and we have some half a dozen *to* more than that named of witnesses to be called before this witness is called.

Mr. Kallis: If the Court please, the attorneys for the defendants were furnished with the name of Mr. Paulvin,

I thould think, at least a week ago. He has been in court on several occasions in the last week, and I am sure the defendants understood that he had been subpoenaed as a witness. I know that Mr. Paulvin has talked with Mr. Schine and told Mr. Schine and explained his presence in Buffalo at this time, and I didn't know that Mr. Paulvin [fol. 2552] was going to be in the court room this morning, but in view of the schedule involving several witnesses, and in view of the fact that he is present now, I would like to put him on primarily to identify some letters.

Mr. McClennen: If he is to do nothing but identify letters and his cross-examination may be postponed to a later time, there is, of course, no objection to that identification taking place now.

Mr. Kallis: That is agreeable to the government, if the Court please.

Direct examination.

By Mr. Kallis:

Q. Your name is Paul Paulvin?

A. Yes, sir.

Q. You lived in Auburn, New York?

A. Yes, sir.

Q. You are acquainted with the Capitol Theatre built in Auburn, New York?

A. Yes, sir.

Q. What, if any, connection have you had with the Capitol Theatre Building since 1927?

[fol. 2553] A. I just own the building.

Mr. Kallis: Mark these for identification.

(Thereupon 34 sheets of paper containing 32 letters were then marked as Plaintiff's Exhibits Nos. 803 for identification.)

Mr. McClennen: This is for identification?

Mr. Kallis: Yes, that is right.

Q. I show you what has been marked as Plaintiff's Exhibit 803 for identification, consisting of 34 sheets of paper, all on the letterhead of Berg & Krumgold, Paramount Building, 1501 Broadway, New York City, and these 34 sheets, constituting 32 letters purporting to bear the sign-

atures of Dave Berg and R. J. Krumgold, the first letter dated June 28th, 1939, the last letter dated October 20th, 1943; take a look at them, Mr. Paulvin, will you?

A. These are the ones I have looked at, I have looked them over carefully and marked each one of them. I personally O.K.'d every one of these letters.'

Q. Did you receive each and every one of these letters?

A. Yes, sir.

Q. And every one of these 34 sheets in the mail?

A. Yes, sir.

Q. And within a few days of the date which each letter [fol. 2554] bears?

A. That is right.

Mr. Kallis: That is all.

The Court: You did not offer them.

Q. Some of these letters were addressed, pardon me, to Mr. Paulvin at different places?

A. They were sent to my addresses.

Q. At Florida and perhaps other places, and you received those letters at the places indicated as your address in the respective letters, is that right?

A. Yes, sir.

The Court: All received by you?

The Witness: Yes, sir.

Q. At my request you turned many of these papers over to me at Auburn within the last couple of months?

A. That is right.

Q. And gave some additional ones to me in the last week in Buffalo?

A. That is right, you had some photos taken of some of them.

Mr. Kallis: That is right. Now, I understand, if the Court please, that Mr. Paulvin will be around here for at least a week more, and counsel has indicated an expectation of calling him and, if that is the case, why——

[fol. 2555] The Court: I suppose they want to examine about these letters?

Mr. Kallis: If that is the case, your Honor, I would like to say in all fairness to counsel I might have further questions to put to Mr. Paulvin.

Mr. McClennen: In accordance with what was stated

earlier, we will defer cross-examination of Mr. Paulvin at present.

The Court: Do you object to the reception of the letters?

Mr. McClennen: They are not offered yet.

The Court: I know they are not.

Mr. Kallis: I am not offering the letters.

The Court: I know that, but I want to know if they were not objecting to the letters.

Mr. McClennen: We do not at this time, before reading them, have any reason to doubt their authenticity.

Mr. Kallis: And their reception?

Mr. McClennen: Please wait. But if we find any doubt, we want to preserve it.

The Court: Withdraw the witness. They are merely marked for identification.

That is all, Mr. Paulvin.

[fol. 2556] ANTHONY J. LAUER, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kallis:

Q. Mr. Lauer, where do you live?

A. Auburn, New York.

Q. How long have you resided in Auburn, New York?

A. Since 1904.

Q. What is your business or profession?

A. Real estate, investments and insurance.

Q. Are you acquainted with Hubert P. Wallace, who operates the Capitol Theatre in Auburn, New York?

A. I am.

Q. How long have you known him?

A. About 12 years.

Q. Have you had any business dealings with him?

A. Yes, sir.

Q. Calling your attention to the years 1938, did you have any dealings with him concerning a contemplated theatre in Canandaigua, New York?

A. I did.

Q. Did you have occasion to make any trips to Canan-
[fol. 2557] daigua with Mr. Wallace in connection with that transaction?

A. I did.

Q. Now, calling your attention to the Jenkins property on the main street of Canandaigua, did you have occasion to meet Mr. J. W. William Jenkins?

A. I did.

Q. Will you please tell the Court what, if any connection he had with the property in question?

A. Mr. Wallace and myself, I called upon Mr. Jenkins at his place of business for the purpose of negotiating a rental of his store property on the main street of Canandaigua, New York.

Q. How many theatres, if you know, were there in Canandaigua at the time?

A. I believe there were two.

Q. At that time?

A. Yes, sir.

Q. What were they?

A. As far as—I don't know the name of the theatres—I think there was one larger and one smaller one.

A. At that time?

A. Yes, 1938.

Q. Who operated those theatres?

A. I understood it to be the Schine Theatre Circuit.

Mr. McClennen: That I object to, if the Court please.
[fol. 2558] The Court: Of course, that is hearsay.

Mr. Kallis: From the interrogatories, I think the witness is obviously mistaken. The interrogatories show there was only one theatre operated by Schine at the time. The one concerning which his testimony is based was constructed about two years and nine months later.

The Court: The interrogatories will take care of themselves.

Q. Did you discuss with Mr. Jenkins what his relation to the property was, was he the owner?

A. He was the owner, yes, he and his sister were the owners.

Q. You had a discussion with Mr. Jenkins, did you?

A. Yes, sir.

Q. And can you tell the Court whether or not a deal was discussed?

Mr. McClennen: That is objected to.

The Court: I will let him answer that far.

The Witness: The question is whether a deal was discussed?

The Court: Yes, and just answer "Yes" or "No".

A. Yes, sir.

Mr. Kallis: Will you please give this the next exhibit number, 804?

[fol. 2559] (Thereupon blue-print was marked as Plaintiff's Exhibit No. 804 for identification.)

Q. I show you what has been marked as Plaintiff's Exhibit for identification No. 804, will you please tell the Court what that is?

A. This is the proposed plan of the moving picture theatre which was to be placed in the building known as the Jenkins Block, I think the name was.

Q. In Canandaigua, New York?

A. In Canandaigua, New York.

Q. After your discussion with Mr. Jenkins, Mr. Lauer, can you tell the Court whether a deal was definitely agreed upon?

Mr. McClennen: That is objected to.

The Court: Sustained.

Q. Do you have in your possession any figures which were the subject of discussion?

A. I have a memorandum which I have with me which was rather a—on which we discussed with Mr. Jenkins the arrangements for a lease of the property.

Mr. McClennen: Just a moment, that fully answers the question.

Mr. Kallis: All right.

Q. Did you and Mr. Wallace make a proposition to Mr. Jenkins?

[fol. 2560] A. We did.

Mr. McClennen: That is objected to.

Mr. Kallis: The question can be answered "Yes" or "No", if the Court please, and doesn't do these defendants any harm, "Yes" or "No".

Mr. McClennen: I quite agree that the answer will not do the defendants any harm, but I object to the question.

Mr. Kallis: It is a preliminary to something that follows, whether they made a proposition to Mr. Jenkins. I did not ask him what the terms of the proposition were.

The Court: I will let him state whether they made a proposition.

The Witness: We did.

Mr. Kallis: Will you please mark this for identification, Mr. Reporter?

(Thereupon telegram referred to was marked as Plaintiff's Exhibit No. 805 for identification.)

Q. I show you Plaintiff's Exhibit for identification No. 805, and ask you whether you have seen that before?

A. Yes, I have received this telegram from Mr. Jenkins.

Q. The telegram is dated May 10th, 1938, purportedly coming from Canandaigua, New York.

[fol. 2561] Mr. McClennen: Just a moment, what its purport is, we object to.

Mr. Kallis: All right, it may go out by agreement. I will offer the telegram in evidence. It speaks for itself.

Mr. McClennen: We object to the telegram being received in evidence.

Mr. Kallis: I haven't offered it, if the Court please.

Mr. McClennen: I thought you said you did.

Mr. Kallis: I said we will offer it.

The Court: Proceed.

Q. Now, you say that you proposed terms to Mr. Jenkins. Now, with reference to the date, when—strike that out, please. Did you receive this telegram which has been identified as Plaintiff's Exhibit 805 after you made the proposition to Mr. Jenkins?

A. Yes, sir.

Mr. Kallis: I offer it, if the Court please.

The Court: Let us see what it is. Have you seen the telegram?

Mr. McClennen: Yes, your Honor, and we take the general objection.

(Thereupon a newspaper page was marked as Plaintiff's Exhibit No. 806 for identification.)

[fol. 2562] The Court: Do you make any question of proof of authentication? There is nothing to show who sent it.

Mr. McClennen: Precisely we make no objection that this paper was received by this witness, but we object to its admissibility.

By Mr. Kallis:

Q. Mr. Lauer, I now show you Plaintiff's Exhibit for identification No. 806, and ask you to examine it, please.

A. I received the copy of this "Daily Message" of Canandaigua, New York, dated May 10th, 1938.

Q. That is the same date as the telegram?

Mr. McClennen: That is objected to. The telegram is not in evidence.

Mr. Kallis: All right.

The Witness: It is dated May 10th, 1938, calling attention——

Mr. McClennen: Just one moment.

The Court: That is enough.

The Witness: I received that paper.

Q. You read that item designated on page 3 of the "Daily Message", Canandaigua, New York, Tuesday, May 10th, 1938, and read the item in the two left columns with reference to the construction of a theatre in the Flannagan Block?

[fol. 2563] Mr. McClennen: Just a moment.

The Court: Leave that reference to the construction of a theatre out. I will let it stand that he read that certain column.

Q. The details with reference to the proposed construction of a theatre——

Mr. McClennen: That is objected to.

The Court: Sustained.

Q. Did you read the left-hand column on page 3?

A. Yes, sir.

Q. And the column immediately to the right of that?

A. Yes, at the time I received it.

The Court: Can you give the date?

The Witness: I received it within a day or two after May 10th.

Mr. Lauer:

Q. What, if anything did you do with reference to this telegram identified as Exhibit No. 805 for identification

and newspaper item designated as Plaintiff's Exhibit 806 for identification?

Mr. McClennen: That is objected to.

The Court: The form of the question is wrong.

Mr. Kallis: What, if anything, did he do, is the question I asked.

Mr. McClennen: That, of course, is objected to.

The Court: Overruled. He received the paper on a [fol. 2564] certain date. Now, with respect to what that notice was and what the paper states, I will let him state what he did after that date in connection with the theatre.

By Mr. Kallis:

Q. All right, Mr. Lauer, what did you do?

A. After receiving the telegram and reading it, I dropped the matter entirely.

Q. Did you talk with anybody?

A. We talked with Mr. Jenkins.

Q. Did you talk with Mr. Wallace?

A. I talked with Mr. Wallace.

Q. When did you do that with respect to the receipt of these exhibits?

Mr. McClennen: For identification.

Q. For identification?

A. Within a day or two, I assume.

Q. Did you have occasion, after you received this newspaper and telegram and talked with Mr. Wallace, to go to Canandaigua and talk with Mr. Jenkins?

A. I did.

Q. And did you have a discussion concerning the telegram?

Mr. McClennen: That is objected to.

The Court: I will let him state if he had a talk about [fol. 2565] the purchase of the building. That is as far as he can go.

Mr. Kallis: Your Honor said there wasn't anything in the record to show Mr. Jenkins sent the telegram. I am offering by this witness to show he talked with Mr. Jenkins, said he received the telegram and asked him if he sent it, and Mr. Jenkins' statement was that he had sent it.

Mr. McClennen: Purely hearsay.

The Court: The question is whether he made a deal or did not make a deal. The question is whether he did or did

not at that time after the receipt of this newspaper of a certain date. I don't think you can state what Mr. Jenkins stated or somebody else said.

Mr. Kallis: With regard to a telegram that bears Mr. Jenkins' signature?

The Court: That question would be obviated by the answer whether he made a deal or did not make a deal.

Mr. Kallis: Your Honor's point is well taken. The reason for the question is that the telegram and newspaper are dated the same day, and I wanted to show a causal connection.

Mr. McClennen: That is objected to on the ground that [fol. 2566] the date of the newspaper and the date of the telegram are not in evidence.

Mr. Kallis: What was the last question?

(Preceding question read.)

The Court: Objection sustained.

Mr. Kallis: I have made my offer, if the Court please. I now offer in evidence Plaintiff's Exhibit for identification No. 806, the newspaper.

Mr. McClennen: That is objected to.

The Court: Overruled at this time.

Mr. Kallis: All right. I will take care of that later. I offer Plaintiff's Exhibit No. 804, which are the plans.

Mr. McClennen: That is objected to.

The Court: Does it appear who drew these plans? There is nothing to show here where they come from so far.

Mr. Kallis: He said these were a set of plans that were drawn for this proposed theatre.

The Court: Prepared by whom?

By Mr. Kallis:

Q. Mr. Lauer, do you know who prepared these plans?

A. Yes, Mr. Wallace, not Mr. Wallace, but Mr. Wallace P. Beardsley.

[fol. 2567] Q. Where does he reside?

A. In Auburn, New York.

Q. What is his business?

A. Architect.

Q. From whom did you receive these plans?

A. At that time from Mr. Wallace.

Mr. Kallis: I offer the plans in evidence, if the Court please.

Mr. McClennen: We object, if the Court please.

The Court: I think they should be received.

Mr. McClennen: Before that ruling is made final, might I call your attention to the fact that if these plans were at all material in this case it would be appropriate that they be presented by a witness whom we could cross-examine with reference to the feasibility of the plans for the place, and whether they amount to anything more than just a piece of paper.

The Court: The question is simply whether plans were drawn, that is all. Not a question of the desirability of the location. Just the fact that plans were drawn. I presume the purpose is to show it is connected with the purpose to purchase.

[fol. 2568] Mr. McClennen: This, if your Honor please, could not possibly be described as a plan. It shows on its face that it is nothing to be dignified by that description. We object to its being received.

Mr. Kallis: I offer it, if the Court please, for what it shows on its face, and in order to please Mr. McClennen I will withdraw my characterization of the document as a plan.

The Court: This paper, you say, you had prepared by Mr. Wallace?

The Witness: No, I did not have it prepared.

The Court: At whose instance did he prepare it?

The Witness: My understanding, of course, was it was prepared for Mr. Wallace by Mr. Beardsley, the architect.

The Court: I thought you said Mr. Wallace. I will receive it. I don't think it is for the purpose of showing—I think it better be marked for identification, and pass on it later.

[fol. 2569] JOHN C. HERZBERGER a witness called by and on behalf of the Plaintiff and having been first duly sworn was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. Herzberger?

A. I am living in Selma, North Carolina.

Q. How long have you resided there?
A. About four years.
Q. What is your occupation?
A. I have a tourist court.
Q. You were formerly engaged in the theatre business?
A. I was.
Q. Where?
A. At Perry, New York.
Q. For how long?
A. 22 or 23 years.
Q. What was the name of your theatre?
A. The Auditorium.
Q. That was during what period?
A. 1913 to 1934 or 1935.
Q. Calling your attention to the year of 1935, did you receive a visit from any one connected with the Schine organization?
[fol. 2570] A. I did.

Mr. McClennen: That is objected to unless he mentions the name.
The Court: Let him state from whom.

Q. Who, if any one, called at your theatre there, say, in the month of July, 1935?
A. Mr. May.
Q. Where was it that he saw you?
A. In front of the theatre.
Q. Anybody else present?
A. Oh, the operator, I believe, and I think my son was there also.
Q. What is your son's first name?
A. Parker.
Q. What was said at that conversation?
A. With Mr. May you mean?
Q. Yes.
A. Mr. May introduced himself and said that he had just closed a deal with Porter Davis, buying a lot for Mr. Schine; they were to build a theatre there seating a thousand persons and costing about $100,000.

The Court: In Perry, you mean?
The Witness: In Perry, yes.

Q. Was that all the conversation?
A. No. He said he hoped Mr. Schine—let's see—Mr.

[fol. 2571] Schine says for him to tell me he hoped we would be friends, or something of that sort.

Q. What did you say?

A. I don't remember my answer. I didn't feel much like talking about anything.

Mr. Wright: I would like to read into the record at this point the answer to interrogatory No. 31, which is headed "List all real estate in which the defendant has had any interest, either by ownership or option to purchase, lease, or option to lease, or otherwise, at any time since August 1, 1931, with the exception of real estate on which a theatre has been located continuously during the entire period of defendant's interest therein, indicating location, nature of interest, date of acquisition, from whom acquired, date on which interest terminated, nature of any improvement during the period of defendant's interest."

Mr. McClennen: We take the same position as before, contending that if a part of the answer to this interrogatory is read, that any other part of it may be read by us at the [fol. 2572] appropriate time.

The Court: We will cross that bridge when we come to it. I am going to let him read what parts he wants to, and I will decide on the question of your right to read it when that question arises.

Mr. Wright: The answer is in the form of a tabulation. Under "Location" appears the statement "Main Street, Perry, New York." Then "Nature of interest: Fee." Then "Date of acquisition: July, 1935." "From whom acquired: Davis." "Date on which interest terminated" is blank. "Nature of improvement now existing": "Vacant land."

By Mr. Wright:

Q. Were you a reader of the weekly paper there at Perry?

A. I was. I still have it.

Q. "The Perry Record" that is?

A. "Perry Record."

Q. After Mr. May's conversation with you did you see any announcement in the paper with reference to that Davis property?

A. I did.

[fol. 2573] Mr. McClennen: That is objected to. That would call for the contents.

The Court: Sustained.

Mr. Wright: It did not call for the contents. I asked if he saw it.

The Court: Yes, it does. It calls for some announcement with reference to the theatre property.

Mr. Wright: Mark these as the next exhibits for identification.

(Four newspapers, "Perry Record," were marked as Plaintiff's Exhibits 807, 808, 809 and 810 for identification.)

By Mr. Wright:

Q. Now, Mr. Herzberger, do you recognize this document that has been marked for identification as Plaintiff's Exhibit 807 as a copy of the Perry Record for Thursday, July 11, 1935?

A. I do.

Q. Did you read it when it came out?

A. Yes.

Q. Did you note at that time the item on the first page there that is outlined in red pencil and headed "Exercise Option of Theatre Site"?

Mr. McClennen: That is objected to.

The Court: Sustained.

Mr. McClennen: Why can we not have——

[fol. 2574] The Court: Sustained. All I think you can do at this time is to fix some date, as of that date, but the contents of the paper, of course, would be hearsay.

Mr. Wright: I think we are entitled to show what knowledge this witness had, whether by hearsay or otherwise. We went into extensive cross examination of Mr. Essick, in which he was asked what rumors, what he had heard about Schine coming into the town. I submit this witness can always testify as to what he saw in the paper.

The Court: If it was received without objection, as these questions were, that is one situation. On cross examination, that is another situation. There is no basis for this.

Mr. McClennen: The question was stating the contents of the paper.

The Court: I will let you show that he read that on the date it bears, such-and-such a date.

Mr. McClennen: That is not the objection that we make.

The Court: I know that.

Mr. McClennen: I am charging that Counsel for the plaintiff attempts to get in the contents of papers not yet admitted [fol. 2575] in evidence, and that is the ground of my objection.

The Court: I am agreeing with you, but I have suggested to him—permitting him to show the date, in order to fix the date that something happened.

By Mr. Wright:

Q. I call your attention to this document, which has been marked as Plaintiff's Exhibit 808 for identification, and ask you if you recognize that as a copy of the Perry Record for August 1, 1935?

A. I do.

Q. Did you read that at the time it came out?

A. I did.

Q. Did you read the article on the front page, that is, with the red line around it?

A. I did.

Q. What was the next time after Mr. May called on you that you saw any representative of the Schine Company?

Mr. McClennen: That is objected to, because it calls on him to determine whether he was a representative.

The Court: He can state who he saw.

Mr. Wright: He might have seen 50 people after that date, but I suppose, to shorten it up, I wanted to identify in some [fol. 2576] way the particular person.

The Court: Whom did you next see?

The Witness: I met Mr. Schine at the Seneca Hotel in Rochester.

Q. What were the circumstances which led up to your meeting with Mr. Schine?

Mr. McClennen: That is objected to.

The Court: Overruled.

A. Mr. Seed, the manager of the—I don't remember the first name.

Q. Was it Harry Seed?

A. Harry Seed, yes, manager of the Warner Bros. exchange in Buffalo, he asked me to meet Mr. Schine in Rochester.

Mr. McClennen: I object to what Mr. Seed said, if your Honor please, and also, no date is fixed.

The Court: Unless there is some connection between Seed and Mr. Schine it is not material—I will let him state the transaction that took place between Mr. Schine.

Mr. Wright: Mr. Seed was manager of Warner Bros. exchange at Buffalo.

The Court: I will receive it. All right. Mr. Seed wanted you——

The Witness: Mr. Seed wanted me to meet Mr. Schine at the Seneca Hotel.

[fol. 2577] Q. You met Mr. Schine at the Seneca Hotel?

A. I did.

Q. Who was present there?

A. Mr. May, Mr. Seed, Mr. Schine and myself.

Q. Any one else?

A. Nobody else.

Q. What was said then?

A. I don't just remember what all was said but Mr. Schine offered me $5,000 for my lease on the theatre.

Q. You were leasing the theatre from whom?

A. From the Town of Perry. I accepted the offer and——

The Court: You, what?

The Witness: I accepted the offer. He drew up a paper—Mr. May drew up a little agreement. We both signed it. The agreement expired on September 1st, but the Town Board objected to having Mr. Schine——

Q. Confine yourself to the conversation there. Was anything said at this conversation about assigning the lease that you had?

A. Oh, yes. I would have to assign the lease. I told him it would be—that the Town Board would not let me sell the lease unless they agreed to it.

Q. You could not assign without the Board's consent?

A. No, I could not assign the lease without they agreed to it.

[fol. 2578] Q. Then, was that all the conversation you had there?

A. I think so.

Q. Then you returned to Perry?

A. I did.

Q. Did you go to the Town Board about assigning the lease?

A. I did. I was at their next meeting, but they refused to have Mr. Schine in there. Wanted me to stay.

Q. Then did you communicate those facts to Mr. May or Mr. Schine?

A. I wrote to Mr. Schine or Mr. May. I don't remember which. I told him the Town Board disagreed, they would not have—would not let me sell the lease.

The Court: Would not have, what?

The Witness: Would not let me sell the lease.

By Mr. Wright:

Q. That was prior to September 1st that that happened?

A. Yes.

Q. Then I will show you this document, marked Plaintiff's Exhibit 809 for identification, and ask you if you recognize that as a copy of the Perry Record for September 26, 1935?

A. I do.

Q. Did you read that on the day it came out?

A. I did, sir.

Q. Did you read the second item from the bottom, in the [fol. 2579] second column from the left, that has the red pencil circle around it?

A. I did, sir.

Q. Do you recognize this document marked Plaintiff's Exhibit 810 for identification as the issue of the Perry Record for Thursday, October 31, 1935?

A. I do.

Q. Did you read that at the time it came out?

A. I did, sir.

Q. Did you read the article at the bottom of the second column from the right, which has the red pencil circle around it?

A. I did, sir.

Q. During September or October of 1935 what, if any, negotiations did you have with any one else for the sale of the theatre?

A. Mr. Osborne of Dipson & Osborne came to see me several times about taking over my lease.

Q. Did you make a deal with them?

A. I made a deal with them, yes.

Q. Did you then continue to have any connection with the theatre?

A. You mean after I sold to them?

Q. After you made the deal with Osborne and Dipson.

A. Yes, I stayed there and managed the theatre for a year.

[fol. 2580] Q. And then you left?

A. They sold—Dipson & Osborne had sold it to Schine, and so I was through.

The Court: What was the last?

The Witness: Dipson & Osborne sold to Mr. Schine, so I was through.

Q. You left at the time the lease was taken over by Mr. Schine?

A. Yes.

Q. Did you leave Perry then?

A. I did.

Q. Now, during the time you were there did you notice whether there was any theatre constructed on the Davis property?

A. There has nothing been done to the property.

Q. Any other theatre constructed there besides the Auditorium?

A. No.

Q. Have you had occasion to return to Perry since you lived there?

A. I am back there once a year.

Q. You have not observed any other theatre there?

A. There is none there, no.

Q. During the time, prior to your sale to Mr. Dipson, were you making money at the theatre?

A. Oh, yes.

[fol. 2581] Mr. McClennen: That is objected to.

The Court: Overruled.

Q. What were the circumstances which led you to sell to Mr. Dipson?

Mr. McClennen: That is objected to, if your Honor please.

The Court: How is that material here? He said he was making money. The reason for his sale would not be losing money, so I don't see how it would be material.

Mr. Wright: Apparently there would be some other reason he was trying to get out. What the reasons or circumstances were for selling out, I think he is competent to state.

The Court: He can state the facts, what happened, what he did.

Mr. Wright: I think we already have the essential facts.

The Court: Not with reference to the Dipson transaction. What occurred, what happened in the interim subsequent to the Schine negotiations and the purchase by Dipson? What transpired during that period?

The Witness: After I sold it to Dipson?

The Court: No, after you negotiated with Schine before you sold it to Dipson.

The Witness: A representative of Mr. Schine called on the [fol. 2582] Town Board and had another meeting before September 1st, and the Town Board left it up to me— they must have had a talk with the Town Board first—and the Town Board left it up to me to decide whether I would sell to Dipson or would I keep the theatre, so I decided I would keep the theatre at that time.

Mr. Wright: You said "Dipson." Did you mean Schine?

The Court: Left it up to you to say whether you would sell to Schine or not?

The Witness: Yes, that was it. I told them I would keep the theatre myself.

By Mr. Wright:

Q. What were the facts which caused you to change your mind about keeping the theatre and selling to Dipson?

Mr. McClennen: That is objected to. It calls for a conclusion.

The Court: State what transpired after these negotiations with Schine. What happened after that before you decided to sell to Dipson?

The Witness: Dipson offered me more money than Schine did.

By Mr. Wright:

Q. Any other?

A. That is the reason I sold to them, yes.

[fol. 2583] Q. Is there any other reason for the sale?

Mr. McClennen: That is objected to, if your Honor please.

The Court: I will let him state, if he can, state the facts.

The Witness: Other reason for the sale?

Q. At the time you sold to Mr. Dipson did you want to go out of the theatre business entirely?

A. Well, I was anxious to get out on account of Mr. Schine

buying that lot in there. If he built a theatre in there I would be losing money right along, wouldn't I?

Mr. McClennen: I ask that it be stricken out.

The Court: Yes. I will let him state, though, what the facts were about Schine having other property in there.

Mr. McClennen: May this answer as given go out?

The Court: Yes, as it stands now.

By Mr. Wright:

Q. How large is Perry, Mr. Herzberger?

A. Perry is about 4200.

Q. Do you think it was large enought to support a thousand-seat house in addition to the one you had?

A. I don't think so.

The Court: 4200 in the village, you mean. That would not include the town?

The Witness: No, just the village of Perry.

Q. Was that your opinion at the time, that it would not?

[fol. 2584] A. It was, yes.

Q. Did that opinion have anything to do with your selling the theatre to Mr. Dipson?

Mr. McClennen: That is objected to.

A. It did.

The Court: Overruled.

Mr. Wright: That is all.

Cross-examination.

By Mr. McClennen:

Q. Mr. Dipson improved the theatre at a substantial expense, did he?

A. Yes, sir.

Q. Put in something like $15,000 or $20,000?

A. I don't think it was that much.

Q. Not that much?

A. I think it was about $13,000.

Q. About $13,000?

A. Yes.

Q. That made the theatre a satisfactory theatre?

A. Yes.

Q. And removed any occasion for having another theatre built in the place?

A. Yes, sir.

Q. Before that improvement the theatre was not at all a [fol. 2585] modern theatre?

A. No.

Q. Been there a long time?

A. Oh, it was built in 1898.

Q. Was it built then as a theatre?

A. Yes, it was.

Q. Had at that time the kind of equipment for stage performances?

A. Yes.

Q. Of course, nothing in it done by way of providing for moving pictures at that time?

A. When it was first built, you mean?

Q. Yes.

A. No.

Q. No attention in its building was given to having its construction of a kind that would be adapted to showing motion pictures?

A. No.

The Court: How long after you sold to Dipson did Schine buy it?

The Witness: About a year later.

The Court: How many seats were in the Auditorium?

The Witness: About 700 after they rebuilt it. They reseated the theatre.

The Court: You mean after Dipson——

[fol. 2586] The Witness: After Dipson & Osborne got it.

The Court: How many did you have in there?

The Witness: Around 600.

The Court: The town still retains title to the building? It is on lease?

The Witness: I think the place is still leased. I saw something in the paper about them having a new post office, last week or the week before last.

The Court: A post office in one part?

The Witness: Post office in the front part, yes, downstairs.

The Court: I have known the building a great many years.

Mr. McClennen: No further questions.

Re-direct examination.

By Mr. Wright:

Q. One further thing that I wanted to clear up. The Davis property there, was that also known as White's Opera House?

A. Yes, it was.

Q. They referred to the same property?

A. Yes.

Mr. Wright: That is all.

Mr. McClennen: That is all.

The Court: We will suspend now until 2 o'clock.

(Whereupon a recess was taken until 2 o'clock p. m.)

[fol. 2587] After Recess, 2 o'clock p. m.

Appearances: As before noted.

Walter A. Smith called as a witness in behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. Smith?

A. Elmira.

Q. Elmira, New York?

A. Elmira, New York.

Q. What is your occupation?

A. Hotel keeper now.

Q. How long have you been in the hotel business?

A. About four years.

Q. You were formerly in the theatre business?

A. About 25 years.

Q. You were at one time employed by the Schine Company?

A. I was.

Q. Where was that?

A. That was in Corning, Lockport and Medina.

[fol. 2588] Q. Did you manage theatres for them in those locations?

A. Yes, sir.

Q. What was the period that you were in Corning?

A. Well, I was in Corning I think three or four different times. The first time I think was 1924.

Q. Calling your attention to 1930, were you then managing a theatre in Corning for Schine?

A. 1930, I was there when they took the houses back.

Q. When they took them back from the Fox Company?

A. From the Fox Company.

Q. That would be what date?

A. That would be 1929 or '30.

Q. You are referring now to the date that the houses were leased to the Fox Company or the date they were taken back?

A. The date they were taken back.

Q. That would be somewhat later, would it not?

A. I just don't remember the date.

Q. 1933, would you say?

A. It was around 1932 or 3.

Q. Then, now, what theatres were there then?

A. In 1933?

Q. Yes.

A. The Fox, the State, the Palace and Plaza.

Q. The Fox, State, Palace and Plaza?

[fol. 2589] A. Yes, sir.

Q. The Fox and State were operated by whom?

A. The Schine people took them back from Fox.

Q. How about the Palace?

A. The Palace at that time was operated by Gerber.

Q. Mr. Frederick Gerber?

A. Yes, sir.

Q. Who was operating the Plaza?

A. Davy & Cohen.

Q. Did you later become associated with the operation of the Palace with Mr. Gerber?

A. I became a partner.

Q. Then how long were you connected with Mr. Gerber, that was, as partner in the operation of the Palace?

A. The Palace Theatre about 14 months.

Mr. Rogers: May we get the dates on that, please?

Q. Was that after or before Schine resumed the operation of the State and Fox Theatres?

A. Fox had the theatres at the time Gerber and I were in partnership.

Q. That was before the period you were in partnership with Gerber, just before?

A. The other two houses were run by Fox.

Q. Then after dissolving your partnership with Mr. Gerber did you continue to operate theatres then?

[fol. 2590] Mr. McClennen: Has he stated when that was?

Mr. Rogers: No, he has not stated.

Q. When was that, as near as you can recall?

A. I could not tell you the dates.

Q. Well, with reference to the time that Schine resumed the operation of the theatres that Fox had been operating?

A. I would say in 1933.

Q. About 1933; then after that did you have anything to do with theatre operations?

A. Yes, I stayed in business.

Q. Where?

A. I was up with Mr. Smalley in Cooperstown, I was in business for myself.

Q. Where were you in business for yourself?

A. Addison and Hammondsport.

Q. The period you were in business at Addison?

A. I was there about six years, 1934 to 1940.

Q. Can you tell us where Addison is with reference to Corning?

A. Well, it is just about 12 miles west of Corning.

Q. And during this period that you operated in Addison, were you familiar with the theatre operations generally in Corning?

A. Kept posted on them, naturally.

[fol. 2591] Q. Do you recall when it was that Schine then took over the operation of the Palace at Corning?

A. That I could not tell the exact date, I don't remember.

Q. Approximate year, do you remember?

A. I would say 1934.

Q. No, when Mr. Schine acquired it?

A. From Gerber?

Q. Yes.

A. That I could not tell you because I wasn't interested when Gerber sold it to Schine.

Q. Yes, that was after you were out of the Palace, I understand?

A. I was out then.

Q. Then you were operating the theatre at Addison?

A. Yes, sir.

Q. How big was Addison?

A. Oh, I would say about 1400.

Q. You had the only theatre there?

A. Yes, sir.

Q. Now, calling your attention to the year 1937, what admission prices were you charging in Addison?

A. Addison, 10 and 25.

Q. 10 for what?

A. 10 for children under 12 and all over 25.

Q. Matinee and evening?

[fol. 2592] A. I only run two matinees, Saturdays and Sunday.

Q. Do you know what prices were being charged during the same period in the Corning first-run houses that were operated by Schine?

A. Well, at that time I think the Palace was 10 and 25; the State was 10 and 20. I think the Fox had two prices, balcony price 25 and 40, 10 for children.

Q. 25 in the balcony and 40 for adults?

A. And 10 cents for children.

Q. 10 cents for children. During that year of 1937, you played a selection of major product, at your theatre?

A. A selective contract with all the companies.

Q. And approximately when did you play pictures there with reference to the time the major features played first-run in Corning?

Mr. Rogers: To that I object on the ground the contracts are the best evidence.

The Court: No, if he knows what the major products were, he may state.

Mr. Rogers: But the question was directed to clearance, may it please the Court.

Mr. Wright: I did not ask him about clearance, I asked him when he played the major products with reference to when it was played first-run in Corning.

[fol. 2593] Mr. Rogers: That is clearance, isn't it?

The Court: He can state whether, when being played in two different towns, they were played at the same time.

Mr. Rogers: That is clearance and the contract will show what contract he had and what clearance was played against him.

The Court: The question is whether you had the major products at the same time they had them at Corning.

The Witness: They had 30 days protection ahead of me.

Mr. Rogers: That is why I raise the objection.

Mr. Wright: At this point we are not interested in the details. I merely want to establish where his playing position was with reference to the first-run in Corning. Will you read the answer?

(Answer read.)

The Court: I will let it stand.

Q. That is, you played the major product, did you, 30 or more days after it played first-run in Corning?

A. Yes, sir.

Q. And calling your attention again to the year 1937, do you recall whether or not there were any so-called student tickets issued in your town for the Schine theatres in [fol. 2594] Corning?

A. You mean Schine had them for Addison students?

Q. I am asking you generally with reference to so-called student tickets issued by Schine.

A. They had a student ticket for 15 cents.

Q. That was the ticket and 15 cents admitted——

A. —any school person, regardless of the age.

The Court: Who had that?

The Witness: The Corning theatres.

The Court: All the Corning theatres?

The Witness: Yes.

By Mr. Wright:

Q. Including Schine?

A. Yes.

Q. Were these tickets issued by the Schine theatres or all the theatres in Corning?

A. First issued by Schine and then Gerber went into it, too. He had it.

Q. With specific reference to these tickets that were issued by Schine, they were good for admission to either of the Schine houses, with 15 cents?

A. Yes.

Q. Do you know how long that practice continued?

A. Oh, I would say probably a year and a half or two years.

Q. Those admissions were good for any time, day or night?

[fol. 2595] A. No, I think they wasn't good on Saturdays or Sundays.

Q. Other than Saturdays or Sundays, any other evening?

A. Yes.

Q. Were tickets of that character distributed by Schine in your town of Addison?

A. They wasn't distributed by Schine, but they was by one of his managers.

Q. Do you know what, if any, qualifications were necessary to receive them, who was a student?

A. I don't think they had any ruling on it, as long as they got a ticket.

Q. Did you ever make any complaint with respect to that practice to any of the film exchanges?

A. I did to all of them.

Mr. Rogers: That is objected to as immaterial.

The Court: State what was said and by whom.

Q. Did you ever discuss that practice with any of the representatives of the major film companies with whom you were doing business?

Mr. Rogers: I press my objection to that, that is immaterial, may it please the Court.

The Court: I will let him state whether he discussed the subject, without stating what the discussion was.

Q. Answer yes or no.

[fol. 2596] A. Yes.

Q. With whom?

A. With Harry Seed, Warner Bros., Sid. Sampson with Fox, Ted O'Shea with Metro-Goldwyn.

Q. Anybody else?

A. No, that is practically the three.

Q. During what time were these discussions?

A. I would talk it over with them every time I would go

to Buffalo. I was in Buffalo every two weeks booking pictures.

Q. During the time these tickets were being distributed?

A. Yes.

Q. First let us take it company-by-company. What conversation did you have with Mr. Seed about it?

Mr. McClennen: That is objected to.

Q. The substance of what you said and what he said?

Mr. Rogers: That is objected to, may it please the Court, immaterial and incompetent.

The Court: If Schine and those other theatres had a 30-day clearance how would the question of the sales of so-called student tickets affect your theatre?

The Witness: Well, it took my Addison high school crowd down there, because they played the picture before I did.

[fol. 2597] The Court: Objection overruled.

By Mr. Wright:

Q. Can you say what was said, as nearly as you can recall, in your conversations with Mr. Seed?

A. I never got any place——

The Court: Strike it out.

Q. You can't give any conclusions. Just the substance of what you said to him and what he said to you, as nearly as you can recollect.

A. I would ask what they could do about it. He said "Nothing. You can do the same." I said, "I don't want to do the same, because I haven't got enough seats."

The Court: You haven't got enough seats?

The Witness: No, I did not have very big seating capacity.

Q. What did he say to that?

A. Said that is all could be done about it. I asked him if I could go into a 10-cent price on the pictures. He said, "Not with my product, you can't."

Mr. Rogers: I move to strike it on the ground that it is incompetent.

The Court: Overruled. Motion denied.

By Mr. Wright:

Q. What was the conversation you had with—was it Mr. O'Shea of Metro?

A. Yes, Mr. Ted O'Shea.

[fol. 2598] Q. Tell us as nearly as you can recall what was said by you and what was said by him when you discussed this question.

A. The same questions to him, that I would like to kill the 15-cent ticket.

Mr. Rogers: That, of course, is subject to the same objection.

The Court: Yes. Say what was said.

The Witness: He just said there was nothing he could do about it, or the Buffalo office.

Q. Did he say why?

A. No. They all had the same answer, I could do the same.

Q. Who was the other gentleman you say you talked to?

A. Sid. Sampson, Harry Seed——

Q. Sid. Sampson, he was with——

A. Fox.

Q. What did you say to Sampson and what did he say to you about that subject?

Mr. Rogers: Same objection, may it please the Court.

The Court: Overruled.

The Witness: It was the same conversation. I never got what I wanted and they still used the student tickets.

Mr. Rogers: I move to strike it out.

The Court: Strike it out, not responsive.

[fol. 2599] Q. You cannot say it was the same conversation. Say what the conversation was, as nearly as you can recall.

A. I asked if there was anything I could do to kill the student price. He told me there wasn't, that they could do.

Q. After you had these conversations did the student tickets continue to be distributed in your town?

A. They never distributed the tickets only the once in Addison.

The Court: What?

The Witness: Just the one time, but they were good indefinitely.

Q. They were distributed once, but they continued to honor the tickets after these conversations?

A. Yes.

Q. You say, as I understood your former answer, this practice continued for about a year and a half?

A. I would say approximately a year and a half.

The Court: He said they were distributed only once.

The Witness: But I mean the tickets were good for that length of time.

The Court: Oh, I see.

By Mr. Wright:

Q. Then it was discontinued some time in 1938?

A. I would say yes.

[fol. 2600] Q. Can you fix that time in 1938 any better than that, just some time during the year? Do you know whether it was summer, spring or fall?

A. I think it was in the fall.

Q. The fall of 1938. Did you have any conversations with these exchange managers you have referred to during this same period, with respect to reducing the amount of clearance held by the first-run Corning theatres over you at Addison?

A. Well, no, I never did, because I was always—I was 30 days behind them. When they played one product I played another. I tried to keep away from it.

Q. You tried not to play the same picture——

A. If they were playing a Metro picture I would put in a Fox.

Q. Whatever you did play was played at least 30 days——

A. They played a lot of pictures I did not play at all. I had a selective contract.

Q. You did not play all their pictures?

A. I did not play all their product.

Q. The pictures you did play, as I understand it, were played at least 30 days prior thereto, first-run, Corning?

A. Yes, sir.

Mr. Wright: That is all.

Mr. Rogers: No cross examination.

[fol. 2601] CHARLES V. MARTINA a witness called by and on behalf of the Plaintiff and having been first duly sworn was examined and testified as follows:

Direct examination.

By Mr. Kalljs:

Q. Mr. Martina, where do you live?
A. Albion, New York.
Q. What is your business or profession?
A. Operating theatres.
Q. Where?
A. At Albion.
Q. How long have you operated a theatre at Albion?
A. Twelve years.
Q. Were you in the motion picture exhibiting business before you went to Albion?
A. Yes.
Q. How many years prior to the time you went to Albion were you engaged in the business of exhibiting?
A. Fourteen years.
Q. Calling your attention to the Empire Theatre in the City of Syracuse, New York, Mr. Martina, did you at any time have any connection with that theatre?
A. Yes.
[fol. 2602] Q. And with reference to the year 1939, was the Empire Theatre being operated?
A. Yes.
Q. When did you become interested in the operation of the Empire?
A. In the fall of 1939.
Q. Did you during the fall of 1939 have a lease on the Empire Theatre?
A. No——
Q. That is all; you did not?
A. No.
Q. Did you later obtain a lease on the Empire Theatre?
A. Yes.
Q. When was that lease executed?
A. In January of 1940.
Q. When did you take possession of the Empire Theatre?
A. March 10, 1940.
Q. Now, Mr. Martina, calling your attention to the fall

of 1939, did you make any effort to obtain products for the Empire Theatre—for the period beginning when you were to have possession?

A. Yes.

Q. What was the nature of those efforts?

A. When I first negotiated with the landlords, I wrote all the film exchanges about October, and I saw them in [fol. 2603] person in Buffalo.

Q. Briefly, what did you say in those letters?

Mr. Rogers: One moment. May it please the Court, that is objected to.

The Court: Sustained.

The Witness: Well,——

The Court: You need not answer.

Q. Did you have any oral conversation with any representatives of the film companies in the fall of 1939?

A. Yes.

Q. When was that?

A. The first time was in October, and in December of 1939 I signed the application for lease, and then I went to Buffalo in the latter part of December, 1939, and spoke to all of them.

Q. Now, you said something about October. Did you have any conversations in October, 1939, relative to buying product?

A. Yes, but I did not make a special——

Q. Just a moment. The answer is yes, you say?

A. Yes.

Q. Whom did you see?

A. I saw Charles Rich of Warner's, the exchange manager.

Q. You say you saw Charles Rich of Warner Bros.?

A. Yes.

[fol. 2604] Q. In October, 1939?

A. Yes.

Q. Where?

A. Buffalo.

Q. What did you tell him?

Mr. Rogers: One moment.

Mr. McClennen: The general objection.

The Court: Does it appear what Rich's position was?

Mr. Kallis: Yes, he was the branch manager of the Buffalo office, and I understood Mr. Martina said something to that effect.

By Mr. Kallis:

Q. Had you known Mr. Rich before?

A. Yes.

Q. How long had you done business with him prior to this conference?

A. I can't recall——

Q. Approximately how many years?

A. —how long he was in Buffalo before that. It was several years.

Q. Several years?

A. Yes.

Q. What had been the nature of your dealings with him?

A. Why, we bought pictures.

Q. He was with what company?

[fol. 2605] A. Warner Bros.

Q. What was his position?

A. Exchange sales manager.

Q. What was said at that conversation?

Mr. McClennen: Just a moment. I don't see that name as being in that position in the list furnished by Warner.

Mr. Kallis: I think the defendants will stipulate that Charles Rich was then working in the Buffalo office of Warner Bros. Are you willing to stipulate that way?

Mr. McClennen: No.

Mr. Kallis: You are not?

Mr. McClennen: No.

Mr. Kallis: All right. Read the last answer.

(Last answer read.)

Mr. Kallis: Read the question.

(Question read.)

Mr. McClennen: That is objected to.

The Court: It is incompetent at this time, unless you show some position—it does not appear what position this man held with the Company.

Mr. Kallis: He testified, if the Court please, that he was branch manager of the Buffalo office.

The Court: Did you say that? Did you?

[fol. 2606] The Witness: Yes, he was sales manager, exchange manager.

Mr. Rogers: That is what the witness said, but the record does not bear it out, may it please the Court.

The Court: We have salesmen and then we have general branch managers. You say sales manager. Does that mean branch manager or does it mean salesman?

The Witness: It really means both branch manager and sales manager.

The Court: Acting in both capacities?

The Witness: He is really the top man.

The Court: Your point is this man is not named as one occupying that position?

Mr. Rogers: Yes, sir, that is the point that is made.

The Court: When was this, did you say?

The Witness: Fall of 1939.

The Court: His office was in Buffalo, you say?

The Witness: Yes.

By Mr. Kallis:

Q. Mr. Martina, prior to this particular conference in question, had you had occasion to see Mr. Rich in Buffalo?

A. Yes.

Q. To the best of your recollection, how often?

A. Well, I would say a dozen times anyway.

[fol. 2607] Q. During what period, how many months?

The Court: Covering what time, he means.

The Witness: It seemed that I knew him for several years before this deal in Syracuse, as I can recall. I must have known him a couple of years.

Q. You met him at the office of Warner Bros?

A. Yes.

Q. In Buffalo?

A. Yes.

Q. Now, Mr. Martina, will you please tell the Court what the conversation was in October?

Mr. Rogers: I still press the objection.

The Court: Did you purchase pictures of this man before?

The Witness: Yes, Judge.

The Court: Over what period of time preceding the time in question, two years, do you mean?

The Witness: As near as I can recall, I believe he must have been in Buffalo for several years before that time.

The Court: How long had you been buying pictures of him prior to this Syracuse matter?

The Witness: Well, with the exchange we bought ever since they have been in business——

The Court: I mean with this individual.

[fol. 2608] The Witness: Well, I presume it must be as long as I knew him, for several years prior to that.

The Court: In the Buffalo office?

The Witness: Yes.

By Mr. Kallis:

Q. You bought them for what theatre?

A. For Albion.

The Court: You claim there is no such person designated?

Mr. Rogers: No, sir, the record is absolutely barren of any mention of Charles Rich, so far as our record shows, and I would like Mr. Kallis to show us any record here that is competent that shows who Mr. Rich was.

The Court: The answer to the interrogatory did not specify anybody by that name?

Mr. Rogers: In the record up to the present there is nothing about this man Rich.

The Court: Your answer to the interrogatory did not specify anybody by that name?

Mr. Rogers: Not our interrogatory, sir. That is Warner's.

Mr. Wright: There were no Warner answers to the interrogatories.

The Court: I am speaking of Warner.

Mr. Rogers: He is speaking of this man Charles Rich being branch manager of Warner.

[fol. 2609] The Court: I understand that clearly. The question is whether there was any mention of him in any way as being a branch manager of Warner.

Mr. Rogers: No, sir.

The Court: In the answers or the stipulation?

Mr. Rogers: That is what I mean, sir.

Mr. Wright: In the Schine answers to the interrogatories there is no information given as to employees of exchanges. We did have interrogatory answers as to exchange employees from Universal, United Artists and Columbia, but not from Warner. We did put in from Warner when Mr. Doherty was on the stand, we covered all the people mentioned in various correspondence, and I thought we covered at the same time all of those who were branch managers during the period in question, but it is possible that we overlooked Mr. Rich. If he did have the position as this witness seems to recall, I believe the conversation would be competent.

The Court: I think this testimony is competent.

Mr. Rogers: On the other hand, it does not lie with this [fol. 2610] witness to state what the powers are of Mr. Rich.

The Court: The statement that he was branch manager will be stricken out but I will let stand what negotiations he had with him in those various years.

Mr. Rogers: I still press my objection.

Mr. McClennen: Could I call your Honor's attention that in the testimony of the Warner——

The Court: Who?

Mr. McClennen: The testimony of the Warner representative, fixing these, Mr. H. A. Seed is given as the branch manager at Buffalo, and within the period that the witness has just described.

Mr. Kallis: Does he give the name of Rich as any kind of employee of Warner Bros. in Buffalo?

The Court: Not any employee. His relation to that would not be competent unless it is something which makes him closer with the authority to negotiate.

Mr. Wright: It appears Rich was the man, whatever his title may have been, with whom he had been negotiating deals for several years. I suppose he could say what negotiations he had with him about this deal.

[fol. 2611] The Court: I will strike out the answer that he is branch manager. I will let the statement stand of his connection with him, or his relation to him.

By Mr. Kallis:

Q. Mr. Martina, what was the conversation that occurred—give us the substance—in October, 1939. What did you say to him and what did he say to you?

A. That I was contemplating taking over the Empire Theatre in Syracuse, and that I wanted his pictures.

Q. If you recall, did you specify the quality of pictures and character of the run?

A. Yes, I was asking for first-run, second-runs, or carry-overs.

Q. What did Mr. Rich say?

A. He said that Schine had the product all tied up, and that he could not help me out. That Schine had it all.

Q. Did you see any one else connected with any of the film companies in October of 1939?

A. Yes, I saw Kenneth Robinson, exchange manager of Paramount Pictures.

Q. Where was that?

A. 464 Franklin Street, Buffalo.

Q. Give us the substance of the conversation.

The Court: Does it appear who Robinson is from the answers?

[fol. 2612] Mr. Kallis: You say, Mr. McKay, that the testimony is that Kenneth Robinson was branch manager in Buffalo in 1939?

Mr. McKay: That is right.

Mr. McClennen: Mr. Robinson was Paramount branch manager from May 2, 1932, to August 15, 1942, according to the testimony.

The Court: Proceed.

Mr. McClennen: The general objection.

The Court: Overruled.

[fol. 2613] Q. What was the substance of that conversation?

A. I told him what I was planning and at that time, in October, he said that I had better wait until I actually had an approved lease of the theatre before we could talk much further on the subject.

Q. And in that conversation did you specify the name of the theatre and location?

A. Yes, sir.

Q. What did you say?

A. The Empire at Syracuse.

Q. Whom else, if any one, did you see in October of 1939?

A. I saw Sid Sampson of 20th-Century-Fox.

The Court: What is the name?

The Witness: Sid Sampson, Sidney Sampson.

Q. What was his position at that time?
A. Exchange Sales Manager.
Q. Where did you see him?
A. At his office at 290 Franklin Street, Buffalo.
Q. Did you have substantially the same conversation with him that you did——

Mr. McClennen: That is objected to, one moment.
The Court: Sustained.
Mr. Kallis: My only purpose, if the Court please, was to save some time.
The Court: There is an objection.
[fol. 2614] Mr. Kallis: Your Honor's ruling is well taken. I did not think they would object. That is the reason I put the question in the form I did.

Mr. Kallis:

Q. Mr. Martina, will you please tell the Court what the subject of the conversation was?

Mr. McClennen: Same objection.
The Court: Sustained. What did Mr. Sampson say, in another form? Overruled.

Q. You may answer, Mr. Martina.

Mr. McClennen: I should say to your Honor while Mr. Sampson had been Branch Manager, he was not at this time.
The Court: What was his position?
Mr. Kallis: I understand he did not leave Buffalo, if the Court please, until 1943. I may be mistaken on that.
Mr. McClennen: The testimony is that Mr. Sampson was Manager, that he was there from December, 1932 to June, 1939. I am not sure that I am not in error, because there is a later statement that he was at Buffalo from 1932 to 1943.
The Court: Objection overruled.

[fol. 2615] By Mr. Kallis:

Q. And will you please give us the substance of the conversation?
A. Do you mean in October or December?
Q. October, with Mr. Sidney Sampson.
A. Well, in October he said that I had better wait until

I got the theatre until we could talk any further on the matter of pictures for the Empire, Syracuse.

Q. Did you see anybody connected with R.K.O. in October?

A. Yes, I saw Charles Boasberg.

Q. What was his position, if you know, at R.K.O.?

A. In the October conversation it was——

Mr. Kallis: Just a moment, an objection has been made.

Mr. McClennen: Who was this man?

Mr. Kallis: Boasberg.

Mr. McClennen: Boasberg was the Branch Manager at Buffalo from January, 1938 to 1940.

The Court: Proceed.

The Witness: In the conversation in October, he stated about the same thing, that I should have a lease for the Empire before I can really talk pictures for that theatre.

Q. Now, what, if any, conversation did you have with anybody connected with Universal?

A. I told John Scully, the Branch Manager of Universal, [fol. 2616] that I expected to acquire the Empire Theatre at Syracuse and I needed pictures.

Mr. Rogers: Subject to the same objection, may it please the Court.

Q. Was that in October, 1939?

A. Yes, sir.

Q. And where?

A. At 505 Pearl Street, Buffalo, at his exchange.

Q. All right, what did he say?

A. He said: "Charlie, why worry about it? Maybe you won't even get the theatre." This was in October, of course, of 1939, so I didn't talk much further with him.

Q. Did you talk with anybody connected with Metro?

A. Yes, sir.

Q. When and where?

A. During October, some time, of 1939, to Ralph Maw, the Exchange Sales Manager.

Q. What conversation did you have with him?

Mr. Rogers: Same objection, may it please the Court.

The Court: Overruled.

The Witness: That I expected to acquire the Empire Theatre from the Massachusetts Mutual Life Insurance

Company, and that I would need product, first-runs or [fol. 2617] second-runs or carry-overs.

Q. By the way, Mr. Martina, with reference to these other men with whom you talked, the other companies, will you please tell us what product and runs you requested?

A. I requested the first-run Syracuse.

Mr. McClennen: Not as to all at once. I object on that ground.

Q. All right, I will lay the foundation. Did you make the same request of all of these companies for the same quality of product and same runs?

Mr. McClennen: That is objected to.

The Court: You are making a comparison. Let him state what was said, naming them.

Q. Did I understand you, Mr. Martina, to say you talked with Ralph Maw?

A. Yes, sir.

Q. He was connected with what company?

A. Metro-Goldwyn-Mayer.

Q. What did you say?

Mr. Rogers: That is subject to the same objection.

The Court: You are speaking now of describing the type of pictures he was seeking?

Mr. Kallis: Yes.

The Court: Objection overruled.

The Witness: That I expected to get the Empire Theatre [fol. 2618] at Syracuse, and I was looking for pictures, either first-run, second-run or carry-overs.

Q. What did Mr. Maw say?

A. Well, in form and substance, he said that I should have the lease, the approved lease before you go into all the trouble of, you know, talking about runs and pictures.

Q. And what conversation, if any, did you have with anybody connected with Columbia in October?

A. About the same thing.

Mr. Rogers: I move to strike.

The Court: I don't see that it is necessary to go over that. I think you are leading up to the subject of the conversation.

Mr. Kallis: If the Court please, I asked Mr. Martina whether he had substantially the same conversation.

The Court: The question is objected to in that form. My question is, is it necessary for you to spend the time on any further statement of what took place in October?

Mr. Kallis: I will bring that to a close in one sentence.

Q. Mr. Martina, you did see somebody at Columbia?

A. Yes, sir.

[fol. 2619] Q. And somebody connected with United Artists?

A. Yes, sir.

Q. Whom did you see connected with the Columbia?

A. Yes, Phil Fox.

Q. Do you know what his position was?

A. Sales Manager.

Q. Whom with the United Artists?

A. Sidney Lehman.

Q. What was his position?

A. Branch Manager, Sales Manager.

Q. You had a conversation concerning the prospective opening of the Empire Theatre in Syracuse?

A. Yes, sir.

Q. Will you please tell the Court whether the Empire Theatre was being operated in the fall of 1939?

A. Yes, sir.

Q. And do you know whether it was being operated daily?

A. Yes, sir.

Q. All right, now, coming down to December of 1939, what, if any, effort did you make to obtain a product for the Empire?

The Court: Did he take a lease in the meantime? He said "operating." Who was operating it in the fall of 1939?

The Witness: Who was operating it in the fall of 1939?

[fol. 2620] Q. Can you answer that question?

A. Yes, I believe it was the Fitzers.

The Court: Did he obtain the lease?

Mr. Kallis: No, not at that time, your Honor. I understood him to say he obtained the lease in January.

The Court: All right.

Q. When was it you testified that you obtained the lease?

A. When? The approved lease was the latter part of January, 1940.

Q. Did you write any letters to the major film companies with reference to product?

A. Yes, sir.

Q. How many companies did you write to of the majors?

A. I wrote to all of them, the eight.

Q. Did you have any conversations in December of 1939 relative to product with any of the major companies?

A. I went to see them all all over again.

Q. By the way, during the fall of 1939, how often did you have occasion to come to Buffalo to the film exchanges?

A. About every two or three weeks.

Q. Did you renew the conversations with these film men?

A. Not from October to December, I didn't renew the conversation about the Empire, but in the latter part of [fol. 2621] December I signed an application for a lease with the Massachusetts Mutual. At that time I wrote letters to all exchanges and I also made the trip to Buffalo.

Q. Now, coming to the month of January, 1940, did you renew the discussions with the film exchanges with reference to product for the Empire Theatre?

Mr. McClennen: That is objected to.

The Court: I will let him state whether he talked with representatives of major distributors with reference to acquiring product, without going into the conversation, I mean.

Mr. McClennen: Well, the generality of this statement, if it is material at all, it ought to appear to whom he went.

The Court: I think it should be followed up with that. It is competent for him to state he did talk with them on the subject of securing picture- in January, 1940.

Mr. McClennen: This is a statement in the form of a talk with all of them, now.

The Court: All right. Let us see what he will testify to, whom he talked to and what was said.

Q. Will you please start with Metro; whom did you talk to in January of 1940?

A. It was about February when I talked to them the third [fol. 2622] time.

The Court: He asked you about January.

Q. Did you have any conversations in January? If the Court please, I will probably save some time by shortening the examination.

The Court: All right.

Q. Now, calling your attention now, Mr. Martina, to the date that the lease was executed, will you please tell the Court whether you made any efforts, after the execution of the lease, with reference to obtaining product?

A. Yes, sir.

Q. When was that, the first time you made any effort?

A. About February 1st again.

Q. Of 1940?

A. Of 1940.

Q. And directing your attention to Metro, did you see any one?

A. Yes, sir.

Q. Who?

A. Ralph Maw,

Q. When and where?

A. About February 1st. I used to go on Monday to catch all film managers in, on a Monday.

Q. What did you say to him?

[fol. 2623] Mr. Rogers: That is objected to.

A. I told him that I now finally had got the approved lease, and that I would want to get a run in Syracuse for the Empire Theatre.

Q. Did you specify what run?

A. Yes, sir.

Q. What did you say?

A. That I had to have either first-run, second-run or carry-overs in order for the theatre to pay.

Q. What, if anything, did Mr. Maw say to you?

A. He said that he was in no position to make any commitment on their pictures.

Q. Give any explanation?

A. Well, that Loew's had their pictures.

Q. Loew's were running their own pictures?

A. Yes, sir.

Q. Now, calling your attention to Paramount, whom did you see?

A. Kenneth Robinson.

Q. And when did you see him and where?

A. About February 1st.

Q. What did you say and what did he say?

Mr. Rogers: That is objected to.

The Court: Overruled.

The Witness: I told him what he already knew, that now [fol. 2624] I finally had an approved lease and that I wanted to get pictures for the Empire, either first-run or carry-overs, or second-run, or some good reissue.

Q. What did he say?

A. Well, he said that——

Mr. McClennen: If your Honor please, the statement of the witness what he already knew, I submit, should go out.

Mr. Kallis: By agreement, if the Court please, by stipulation, the phrase "What he already knew" may go out.

Will you read the last thing he said?

(Preceding partial answer read as follows: "A. Well, he said that——".)

A. (Continuing:) He said that Schine had the pictures 100 per cent, and that the best he might try to see if he can give me a cow-boy picture.

Q. What, if any conversations, did you have with anybody connected with R.K.O. in February after you obtained the lease?

A. I went to Mr. Boasberg and he said that Schine had all the product, and that the best he could do was to give me some news reels, if I wanted them.

Q. Did you talk with anybody connected with Fox?

[fol. 2625] A. Yes, sir, with Sidney Sampson.

Q. And approximately the same time?

A. Yes, the same date.

Q. What was said?

A. He said I didn't have a chance in the world, because Schine played 20th-Century-Fox 100 per cent, and I didn't have a chance in the world to get any pictures from them.

Mr. Kallis: Just a moment, I understood you were making an objection, Mr. McClennen?

Mr. McClennen: The general objection.

The Court: Same ruling.

Q. And did you talk with anybody connected with Universal?

A. Yes, with John Scully.

Q. And what was the conversation?

Mr. McClennen: Same objection.

The Witness: Well, he said that Schine is pretty well tied up with them and he didn't see how he could let me have any product.

Q. Did you talk with Warner Brothers?
A. Yes, sir.
Q. Whom at Warner Brothers?
A. Charles Rich again.
Q. And about the same time?
A. Yes, sir.
[fol. 2626] Q. What was said?

Mr. McClennen: Same objection.
The Court: Same ruling.
The Witness: He said that Schine had all their product there, but before I opened up he might see if Schine will reject some poor picture, and maybe he can let me have that.

Q. Now, calling your attention to Columbia, did you see anybody connected with the Company about the first of February, after your lease was executed?
A. Yes, sir.
Q. Whom?
A. Bill Fox.
Q. What was the substance of the conversation?

Mr. McClennen: Same objection.
The Witness: He said that their product is pretty well ties up in Syracuse and that he would let me know if any rejects later on, and that he might——
The Court: What was the Empire running when it closed?
The Witness: When the theatre closed?
The Court: Yes, before you took over.
The Witness: Before I operated?
The Court: Yes.
The Witness: Well, it was running bingo and all kinds of
[fol. 2627] policies and pictures.
The Court: Shorts?
The Witness: No, they were regular pictures, but I believe they were some sort of a run, but not first-run.

By Mr. Kalis:

Q. And did you talk with anybody connected with United Artists?
A. Yes, sir, Sidney Lehman.

Q. At the same time?
A. Yes, sir.
Q. What was the substance of the conversation?

Mr. Rogers: Same objection.
The Court: Same ruling.
The Witness: He stated that he would look into the matter and let me know later.

Q. Now, Mr. Martina, when did you open your theatre?
A. On March 23rd, 1940.
Q. Will you please tell the Court what product was offered, say, starting with Paramount?
A. Well, Paramount gave me a cow-boy picture by the name "Lano Kid".
Q. Anything else?
A. No.
Q. What product was offered to you by R.K.O.?
[fol. 2628] A. Nothing but news reels.
Q. And Fox?
A. Nothing.
Q. Universal?
A. Nothing.
Q. Warner's?
A. Charles Rich came to me when I was at the Syracuse Hotel, just before we opened, and he said "I have got a picture for you, Charlie, that Schine can't play, and maybe you want it, and I will sell it to you for a bargain price of $600". Well, in my condition I grabbed it.

Mr. Rogers: I move to strike out "in my condition I grabbed it".
The Court: Yes, he is asking for the conversation now. He offered you a picture for $600 and you accepted it.
The Witness: Yes, a foreign-made picture, and I did sign a contract for that.

Q. Do you know whether that picture, Mr. Martina, played anywhere in Syracuse at any time?
A. I don't think that anybody would play it.

Mr. McClennen: I move to strike that out.
The Court: Strike it out.
Mr. McClennen: Let's get the title.
[fol. 2629] Mr. Kallis: If the Court please, I thought he mentioned the name of the picture.

The Witness: The "Mad Empress" was the name.

The Court: He made the statement he didn't think anybody else would play it. Did, is the question, did anybody else play it?

Q. Did the picture, to the best of your recollection, ever play in Syracuse any place else except at the Empire Theatre, while you were operating it?

A. No.

Q. That was, you say, whose product?

A. Well, Warner Brothers, Vitagraph distributed it, I don't know whose product it was.

Q. What product was offered you by Metro?

A. None.

Q. What product was offered you by Columbia?

A. None at that time.

Q. What product was offered you by United Artists?

A. United Artists gave me two pictures.

Q. Were those the only pictures that were offered you by the eight majors?

A. Yes, sir.

Mr. McClennen: That is objected to.

The Court: Well, it is leading.

Mr. Kallis: I can reframe the question if Mr. McClennen [fol. 2630] pleases.

The Court: I will let it stand.

Q. Now, Mr. Martina, I understood you to say that you have been in the motion picture business continuously for 26 years?

A. Yes, sir.

Q. In the State of New York?

A. Yes, sir.

Q. Will you please tell the Court what character or quality of pictures these four were with reference to their being native, domestic or foreign pictures, whether they were A, B, C or D features, as commonly understood in the trade?

Mr. Rogers: I object to that.

The Court: You mean those which he got and to which he referred?

Mr. Rogers: I object to that on the ground he is not qualified, and it is immaterial.

Mr. Kallis: It isn't immaterial. I think he has been very

well qualified in the exhibiting business 26 years continuously in the State of New York.

The Court: We haven't any proof there is any gradation, A, B, C and D.

Mr. McClennen: Your Honor is quite right, there is no [fol. 2631] competent proof on that subject as far as we have proceeded.

Mr. Kallis: May I have one of your contracts, Mr. Rogers? I think I can demonstrate what I have in mind.

Mr. Rogers: One of my contracts?

Q. Will you enumerate the names of them again?
A. "Chump at Oxford".
Q. What Company's product was that?
A. United Artists.
Q. Next?

Mr. Rogers: One moment, who are the stars in that?

The Witness: Laurel and Hardy.

Q. What is the next one?
A. "Lion Has Wings".
Q. Whose product was that?
A. It was a British propaganda; it was United Artists.
Q. Was that a domestic picture or foreign picture?
A. Foreign.
Q. Do you know whether that played in any of the Syracuse houses to your knowledge before?

Mr. McClennen: Do you mean before he played or after he played, or when?

The Witness: Before or after?

Q. Either before or after.
[fol. 2632] A. That was sold first-run. Therefore, it didn't play before.

The Court: Sold to you first-run?

The Witness: Yes, sir.

Q. And had not played in any of the Schine houses?
A. No, not in Syracuse.
Q. What is the next one?
A. Republic gave us some cow-boy pictures, too.
Q. You mentioned four altogether, what majors were the other two?
A. The Paramount picture, cow-boy, "Lano Kid", and this Warner Brothers "The Mad Empress", a Mexican picture.

Q. Was "The Mad Empress" a domestic or foreign?

A. Foreign.

Q. Had that played at any of the Schine houses prior to your playing it?

A. I don't think that did.

Mr. McClennen: A motion to strike.

Mr. Kallis: By agreement.

The Court: The question is whether that did.

The Witness: No, I don't believe so.

Q. "Lano Kid" had that played at any of the Schine houses before you played it?

A. No.

Q What about "Chump at Oxford"?

[fol. 2633] A. You mean before?

Q. Before.

A. No, I don't think so.

Q. All right. After you opened the Empire Theatre on March 23rd, 1940, did you renew your request for product?

A. Yes, sir.

Q. Whom did you see?

A. I saw all the film exchange managers on Mondays.

The Court: You mean the second time. He told about one time he sought product.

Mr. Kallis: That is right. Now, I am asking him—that was prior to the time he opened, and now I am asking what request he made for product after he opened the theatre?

Mr. McClennen: May we get the date?

The Court: Tell us what time, with reference to whom you opened it.

The Witness: What time I opened?

The Court: With reference to when you opened, when did you have the talk about the pictures?

Q. After you opened the theatre?

A. I came to Buffalo again about February 15th.

The Court: I thought you said you opened in March.

Q. The efforts you made after you opened the theatre to buy product?

A. Oh, I came to Buffalo after the grand opening of the Empire, yes.

[fol. 2634] Q. When was the first time you made any effort in Buffalo to obtain product?

A. It was so many times I can't——

Q. How many times?

A. After I opened?

Q. Yes.

A. Well, I only lasted three weeks. I didn't come very much, I think only once.

Q. You say you lasted three weeks. Please tell the Court how many weeks and how many days you operated the Empire Theatre.

A. Three weeks and six days.

The Court: Three weeks, he said.

Mr. Kallis: Three weeks and six days.

Q. Is that your testimony?

A. Yes.

Q. Then you closed on what date?

A. April 18, 1940.

Q. You say you made one more trip after you opened?

A. Yes.

Q. Or more than one trip?

A. Well, once I am sure, but I would not say for any more, because——

Q. With reference to the trip about which you are sure, please tell us whether you saw anybody at Paramount?

[fol. 2635] Mr. Rogers: May we get the date, please?

Mr. Kallis: Let us get a yes or no answer.

The Court: It must have been within the three weeks and six days.

Mr. Rogers: He does not pin him down.

Mr. Kallis: I will pin him down as soon as I get a yes or no answer, whether he saw him. If he says "no" I can't ask him when and where.

By Mr. Kallis:

Q. Did you see anybody——

A. Yes.

Q. —connected with Paramount, after you opened your theatre?

A. Yes; after March 23rd you mean?

Q. Yes.

A. Yes.

Q. Now, please tell us when. That is the question Mr. Rogers put to you.

A. Well, it was some time between, I imagine, about one week after the opening, that I was able to get away.

Q. I understood you to say that was in Buffalo?

A. Yes.

Q. Whom did you see at Paramount?

A. Mr. Robinson.

Q. What did you say and what did he say?

Mr. Rogers: Same objection.

[fol. 2636] The Court: Overruled.

A. At that time he gave me the "Llama Kid", cowboy picture.

Q. Is that L-i-o-n-e-l Kid?

A. I think L-h-a-m-a or something, "Llama Kid".

Q. What did he say?

A. That he could sell me that for $250.

Q. Did he offer you any more products?

A. No.

Q. What about RKO, did you see anybody after you opened?

A. Yes.

Q. Whom?

A. Mr. Boasberg.

Q. When and where?

A. At Buffalo.

Q. What did you say to him and what did he say?

A. That he could let me have the news reels, and that is all.

Q. Any further conversations that you recall?

A. No, excepting that he told me that I should know that Schine has got it tied up, the product, and "that is the best we can do for you."

Q. Did you talk with anybody during the same period connected with Fox?

A. Yes.

Q. Whom?

A. Mr. Sampson.

[fol. 2637] Q. When and where?

A. At that time, about a week after March 23rd.

Q. What did you say and what did he say?

Mr. Rogers: Same objection.

The Court: Same ruling.

A. He said there was nothing for me.

Q. Any other conversation that you recall now?

A. With any other exchange?

Q. No, with Mr. Sampson.

A. No, there wasn't much said, only that he could not take product away from Schine and give me anything.

Q. What about Universal?

A. John Scully said the same thing.

Mr. Rogers: Same objection.

The Court: Same ruling.

Q. Warner Bros.?

A. Why, Warner's, I don't believe I seen them, because Charlie Rich came to see me at the Syracuse Hotel and gave me this "Mad Empress" thing.

Q. That was during the time you were operating the Empire?

A. Yes.

Q. Did you see anybody connected with Metro?

A. Yes, Mr. Maw.

Q. During the same period?

A. Yes.

[fol. 2638] Q. What was the substance of the conversation?

A. That there was nothing available.

Mr. Rogers: Same objection.

The Court: Same ruling.

Q. Anything else you recall about that conversation?

A. No, except that he could not commit himself to any future pictures or anything.

Q. Could not—I did not hear you.

A. Commit himself to giving me any of the Metro-Goldwyn pictures.

Q. Did you say "in future"?

A. Yes.

Q. What about Columbia?

A. Well, it was the same thing.

Mr. McClennen: Same objection.

Mr. Kallis: By agreement that answer may go out, "the same thing."

Q. Whom did you see?
A. Mr. Fox, Phil Fox.
Q. Was that in Buffalo?
A. Yes.
Q. During the period you operated the Empire?
A. Yes.
Q. Give us the substance of the conversation, what you said and what he said, relative to your buying product [fol. 2639] for the Empire Theatre in Syracuse?
A. Now, I can't recall if he offered me one of those mediocre rotten pictures at that time or not.
Q. That is the best of your recollection now?
A. Yes.
Q. Did he offer you any other product besides—did he offer you any good product?
A. No.

Mr. Rogers: I object to that, may it please the Court.
The Court: Sustained. Let him state what he was offered.

Q. Did he offer you anything else?
A. No.
Q. Whom, if anyone, did you talk with at United Artists?
A. Well, Sidney Sampson—I mean Sidney Lehman—had already given me everything that he could, those two pictures, "Chump at Oxford" and "Lion Has Wings."
Q. Did you have any conversation with him during the period you operated the theatre?
A. Yes.
Q. In Buffalo?
A. Yes.
Q. What was the substance of the conversation?
A. Well, that he could not help me out any more than he did.
Q. Now, Mr. Martina, with reference to these conversations that you had with these film men in Buffalo during [fol. 2640] the period you operated a theatre, do you recall whether anything was said concerning runs or revivals, holdovers, or any other particular kind of pictures?
A. Well, excepting what I have said, that I was willing to take carry-overs, second-runs, or even some old reissues.
Q. Will you please explain what you mean by "carry-overs"?
A. Carry-over is after a picture gets through one week,

it moves over to another theatre. For instance, it plays in this theatre one week, and then the following day, without any lapse of time or anything, it moves right to another theatre for the following week.

Q. Is that considered a second-run play?

A. No, that is a hold-over or carry-over.

Q. Those are the expressions that are commonly used in the trade?

A. Yes, carry-over or hold-over.

Q. How many pictures did you play during the three weeks and six days?

A. Five pictures.

Q. During that period did you run any stage shows at all?

A. The first three weeks, the first week was six days, and two weeks—approximately three weeks of stage shows and pictures.

Q. You mean the first three weeks of your operations—[fol. 2641] A. Yes.

Q. —you played stage shows, and the last six days you played only pictures?

A. Yes, the last week.

Q. Calling your attention now to the first week of your operation, what stage show did you have?

A. Gene Krupa was the first attraction, for six days, and then— and "Chump at Oxford".

Q. What was the size of the Empire Theatre at that time, with reference to seating capacity?

A. It was about 1500 seats.

Q. Can you tell the Court how many people attended the Empire Theatre the first week when you say you had "Chump at Oxford" and Gene Krupa and his band?

A. About—well, that was about 18,000 that first six days.

Q. 18,000?

A. Approximately, yes.

Q. Will you please tell the Court, if you know, what your gross receipts were during this six-day period?

A. The first three weeks period it averaged about $7000 a week.

Q. What was the attendance for the second and third weeks?

The Court: He said the first three weeks he averaged $7000.

Mr. Kallis: No, he said that there were 18,000 persons attended his theatre the first six days. I am asking him [fol. 2642] the same question with reference to the second week.

A. The average—the three weeks' period averaged 20,000 people, about. One week was a little more than 20,000.

The Court: Almost the capacity of the house?

The Witness: Well, your Honor, this was a week, and there was continuous showing, four performances a day.

Q. Now, Mr. Martina, will you tell the Court what your gross receipts were for the last six days of your operation?

A. Mid-week days averaged $35 a day and Saturday $76, and on a Sunday, $98.

Mr. Kallis: Just a moment. Repeat that, Mr. Reporter. I did not get it.

(Last answer read.)

Q. What was the attendance in terms of people going to your theatre during the last six days?

A. You mean without the band?

Q. The last six days you operated without the band, yes.

A. About a thousand people.

Q. Mr. Martina, you closed your theatre April 18, 1940?

A. Yes.

Q. Did you keep informed as to what the theatre situation was in Syracuse for the remainder of the year?

[fol. 2643] The Court: In what respect do you mean?

Q. With respect to what was the character of the operation of the Empire? Do you understand my question?

A. No, I don't.

Mr. Rogers: I don't.

Mr. Kallis: I do, but I am not surprised that nobody else does. I sometimes talk in riddles, I presume.

Q. Who was the first person or organization to operate the Empire Theatre in 1940 after you closed down?

A. Schine took it over.

Q. Now, when was that, as nearly as you can recall?

A. Well, it was the latter part of the year or the first of the following year, after six or eight months, I believe it was.

Q. After Schine took over the Empire Theatre do you know what was playing at the Empire Theatre in the way of product?

Mr. Rogers: One moment. Answer yes or no to that.

The Court: Do you know what played there after Schine took it over?

The Witness: Yes.

Q. And with reference to the pictures that Schine played at the Empire during the first six months—let us say the first three months of Schine's operation, please tell the [fol. 2644] Court what it was.

Mr. Rogers: One moment. I object to that on the ground that the tenure of Schine's operation has not been fixed by this witness.

Mr. Kallis: But it has been fixed by the interrogatories.

Mr. Rogers: Let us get it, and see if he knows.

The Court: What period of time are you inquiring about? How long a time, in this question?

Mr. Kallis: In this question, I thought I narrowed it to three months. First three months of Schine's operation.

Mr. Rogers: Let us find out what period he is talking about and see how remote it is.

The Court: He said Schine took over about the first of the next year. That is what he testified to.

Mr. Rogers: I wonder if that is accurate.

The Court: Six or eight months, he said, to the first of the next year. It would be from May.

By Mr. Kallis:

Q. Well, can you tell us, Mr. Martina, what product Schine played at the Empire for the first three months after it opened, the Empire Theatre?

Mr. Rogers: May it please the Court, there is no evidence that this witness lived in Syracuse during that period.

[fol. 2645] Mr. Kallis: I know that, but he did say he was informed.

Mr. Rogers: Oh, well, then, I certainly do object to it.

The Court: Sustained. Did you see pictures there playing at the Empire after?

The Witness: I will tell you, your Honor, I just merely used to get a Syracuse Sunday paper, just to see what was going on.

The Court: Personally you don't know?
The Witness: No, only by the news ads.
The Court: Objection sustained.
Mr. Kallis: I can prove it, your Honor, if you think that is objectionable.

By Mr. Kallis:

Q. Well, your answer would be the same with reference to the Strand Theatre?
A. Yes.
Q. All right. Do you know who was operating the Strand in Syracuse in the fall of 1939?
A. Yes.
Q. Who?
A. Schine.
Q. Do you know with reference to the playing policy how Schine operated the Strand in the fall of 1939?
A. As near as I can recall they operated—they used up two pictures a week.
[fol. 2646] Q. Now, was that a double feature or single feature?
A. Double feature.
Q. How many changes a week?
A. One.
Q. Was any change made in Schine's playing policy in that regard between October 1, 1939, and the time you opened your theatre, March 23, 1940?
A. Well, I was only interested during the period that I signed the application, was in December, they played two or three pictures in the Strand, as nearly as I can recall, and then when they—evidently—well, I don't know—in January then they started consuming three or four pictures a week, January, 1940.
Q. Do I understand you to say there was a change in Schine's playing policy at the Strand and it began January, 1940?
A. Yes, they started using more pictures.
Q. Please tell the Court in what respect the situation was different?
A. Well, in December——

Mr. McClennen: Just a moment. That is objected to.
The Court: You are asking now what they played that they had not played——

Mr. Kallis: I understood, your Honor, he said Schine's were playing a double-feature, one change a week.

[fol. 2647] By Mr. Kallis:

Q. On that subject, prior to January 1, 1940, Mr. Martina, was Schine's playing a stage show in addition to this double-feature, one change a week, if you remember?

A. I don't believe they played the stage show. They did make one change a week.

Q. What is that?

A. They made one change, but in December, I don't believe they even operated on only maybe two or three pictures they used up, some time or other, and then in January they started consuming three or four pictures a week, and a big stage show.

Q. What do you mean by two or three pictures a week, how many changes?

A. They would have two changes.

Q. Two changes, and they were both changes, double features?

A. Not always. If they would have a big band or big stage show they would have one feature, and the other change would be double fature.

Q. How long did that policy continue at the Strand beginning with January?

A. Well, until they got me out of commission.

Mr. Rogers: I move to strike it out.

Mr. Kallis: By agreement it may go out. Try to give us, as nearly as you can recollect, the best date. Was it [fol. 2648] before or after April 23, 1940?

A. They closed within a few weeks after I quit.

Q. Schine's closed the theatre?

A. Yes.

Q. The Strand, you mean?

A. Yes.

Q. All right. Now, coming down to the specific period during which you operated for three weeks and six days, please tell us what Schine played at the Strand the first week?

A. On the opening, when I opened, they opened up with a big movie star in person, and I believe it was a big Fox picture.

Q. Do you recall the name of it?

A. Jane Withers in "Shooting High." Anyway, I think it was something like that. John Boles in person.

Q. John Boles. And you are not sure, I gather, as to the name of the picture they played the first week?

A. I believe it was 20th Century-Fox, but I am not positive.

Q. What about the second week?

A. They had big stage shows——

Q. Who was——

A. They had big bands, like Paul Whiteman—well, I wasn't there too long.

[fol. 2649] Q. I am talking about the second week of your operation of the Empire.

A. It was big stage bands and personal appearances of movie stars, while I was there.

Q. Did Paul Whiteman and his band actually play at Schine's Strand while you were operating the Empire?

A. Yes.

Q. For how long?

A. For a week.

Q. Was any motion picture exhibited at the Strand during that time?

A. Yes, they had the stage and pictures too.

Q. What about the third week?

A. Well, I don't know if this was the second week of my operation, with Paul Whiteman, but they had stage and sometimes they would use up four pictures, and three pictures and three pictures with a stage show on week ends, and then double-feature.

Q. Mr. Martina, if you recall, will you tell us whether Paul Whiteman and his band played at the Strand Theatre in Syracuse during the three weeks and six days that you operated the Empire?

A. Yes.

Q. For how long?

A. For one week.

[fol. 2650] Q. You are not sure which week it was that he played?

A. I am not sure of the week.

The Court: Had the Strand been operated right along before, some time before you opened up?

The Witness: Yes, your Honor, only on a lesser scale.

They didn't use up the pictures until January 1st, then they started consuming pictures.

The Court: It was in operation when the Empire was closed the preceding fall?

The Witness: It was not operating quite as much.

The Court: Operated every day or at intervals?

The Witness: Before?

The Court: Yes.

The Witness: January—they operated week ends, I believe.

By Mr. Kallis:

Q. Mr. Martina, just one question I want to ask you, and then I am through, I guess. I am not sure that this was made entirely clear, and I beg your Honor's indulgence if I do repeat: During the month of December, 1939, Mr. Martina, was Schine's playing any stage shows at the Strand?

A. I don't believe so.

Q. They were operating on how many changes a week?

A. Well, I doubt if they even operated very many days [fol. 2651] during—before January 1st.

Q. All right. Then confining your attention to January and February, how many changes a week did they make, as nearly as you recall?

A. They made two changes, excepting with movie stars and personal appearances, Paul Whiteman and big bands, they would hold the thing a full week and make one change then.

Q. Prior to playing stage shows, I understood you to say that for a period there they played double features with one change a week, is that right?

A. Yes.

Mr. Kallis: That is all, Mr. Martina.

Cross-examination.

By Mr. Rogers:

Q. Mr. Martina, before you actually made your deal on the Empire Theatre in Syracuse did you make a survey of the theatre condition in Syracuse at that time?

A. Yes——

Mr. Kallis: If the Court please, just a moment. I did not go into this on direct examination, and I think it is time-consuming, but I do not object to it.

The Court: Overruled. Proceed.

[fol. 2652] Q. You may answer the question.

A. What did you say again?

Mr. Rogers: Mr. Reporter, please read it?

The Court: Did you make a survey of the theatre situation in Syracuse?

The Witness: I knew that the theatre was——

Q. Just answer my question, Mr. Martina. Did you make a survey of the theatre condition in Syracuse before you made your deal on the Empire Theatre?

The Court: Explain what you mean by "survey."

Q. Well, don't you understand what I mean by the word "survey"?

A. Well, my interpretation is what the layout is.

Q. That is it exactly.

A. I thought the Empire was a darn good location.

Q. I am not talking about the Empire now. I am asking you, did you inquire into what the general theatre situation was in Syracuse before you made your deal on the Empire?

A. Why, I was under the impression that Schine could not take over any more theatres.

Q. Will you please answer my question? It is a very simple question. All I am asking you is: Did you inquire into the general theatre situation in Syracuse before you made your deal on the Empire Theatre? You should be [fol. 2653] able to answer that. That is very simple.

A. Yes, I did.

Mr. Kallis: Just a moment, Mr. Rogers. I just happened to think of a question or two which I should have put to Mr. Martina on direct, and not related to this question, and I just wanted to state that I would like that privilege later.

The Court: All right.

By Mr. Rogers:

Q. Then you did. Did you examine into how many first-run theatres there were in Syracuse at that time?

A. Yes.

Q. How many first-run theatres did you find were in Syracuse at that time?

A. There is Loew's and Keith's, Paramount, Echo, the Strand and the Empire.

Q. Are those all the theatres, first-run theatres, you found in Syracuse at that time?

A. First-run?

Q. Yes.

A. Yes.

Q. Well, in other words, you found that the Loew Company had their own theatre in Syracuse, did you not?

A. Yes.

[fol. 2654] Q. You found Warner Bros. had their own theatre in Syracuse at that time, did you not?

A. No, they didn't have no theatre.

Q. Warner had no theatre?

A. No.

Q. Didn't the Warner have the Strand Theatre in Syracuse?

A. No, Schine had the Warner's—I mean the Strand.

Q. What?

A. No, just Loew and Schine controlled the situation of the city, down-town theatres.

Q. You knew that RKO had their theatre in town, did you not the Keith Theatre?

A. Well, I understood that that was a Schine management and everything.

Q. That was your understanding?

A. Yes.

Q. Didn't you know, as a fact, that the Keith Theatre is an RKO Theatre?

A. Well, for all practical purposes, I considered it a Schine theatre, because they buy and they manage it, and they—they are the ones that drive other people out of business.

Q. Do you know of your own knowledge that Schine did buy for the Keith Theatre in Syracuse, or is it not a fact that RKO bought for the Keith themselves?

[fol. 2655] A. Well, I am not in a position to state facts, because I don't know that part. I know they managed it.

Q. You mean you don't know, isn't that right?

A. I know they managed it, and that's all. Schine managed it.

Q. I am asking you, do you know who bought the product for the Keith Theatre in Syracuse during the time you are talking about, in the fall and winter of 1939 and the spring of 1940?

Mr. Kallis: If the Court please, I object to this, because their answers to the Government's interrogatories show with respect to the Paramount, Strand, the Echo, the Keith; four of them that I can think of, that the operation was an RKO-Schine operation.

Mr. Rogers: Exactly.

Mr. Kallis: And they stated that under oath in the answer to our interrogatories.

Mr. Rogers: That is just the point I am making. Thank you.

The Court: Proceed.

Mr. Kallis: So, when Mr. Rogers asks Mr. Martina, "Isn't it a fact that it was an RKO operation", I submit to your Honor that is not giving in his question all of the essential ingredients. It was an RKO-Schine operation. [fol. 2656] Mr. Rogers: That does not happen to be my question. My question is, "Did RKO buy for these theatres?"

The Court: Proceed.

By Mr. Rogers:

Q. Will you please answer my question?
A. I am in no position to know what is being done.
Q. You don't know, do you?
A. All other people's business, no.
Q. I say, you don't know, do you?
A. No, I don't know who bought.

Mr. Rogers: Now, in that connection, may it please the Court, I move to strike out the testimony of this witness, given under direct examination, that Schine operated and bought the product for these theatres. He now testifies he does not know.

The Court: I will let it stand. The question of contradictions can be taken care of by your own testimony.

Q. For many years before February of 1940 these first-run theatres had been playing the product of the major companies as first-run product, had they not?

A. Well, I wasn't familiar with Syracuse too long, excepting the insurance company told me that the Empire [fol. 2657] was the best theatre in the city a few years ago, until Schine came in.

Mr. Rogers: I move to strike all that out.

The Court: Strike it out. Just answer his questions.

Q. Mr. Martina, if you will please be so good as to answer my questions we will get through so much quicker.

The Court: If you don't know anything about the situation prior to 1939, you can so state.

Q. Did you know anything about conditions with reference to first-runs or subsequent runs in Syracuse prior to the fall of 1939?

A. No, not too much.

Q. Didn't know too much about it. All right. Now, you stated, as I understand it, that in the month of December, 1939, you wrote a series of letters to the different exchanges?

A. Yes.

Q. Asking them for product at the Empire Theatre?

A. Yes.

Q. And that, in substance, you stated you wanted either first-runs or second-runs or carry-overs, is that right?

A. Yes.

Q. And that was contained in all of these letters that you wrote in December?

A. Yes.

[fol. 2658] Q. And that all the letters that you wrote to the eight companies were the same, were they not?

A. I believe so.

Q. You said you also, at the same time, spoke to various branch managers of the eight companies and spoke to them about getting pictures either first-run or second-run or carry-overs, is that right?

A. Yes.

Q. As a matter of fact, didn't you merely ask for first-run from these various branch managers with whom you spoke?

A. No, I asked for second-run and carry-overs.

Q. You are sure——

A. If I could not get first-run, naturally, I wanted first-run if I could get it.

Q. You say so far as the managers were concerned, so far your letters were concerned, they all spoke about first-run, second-run and carry-overs, is that right?

A. I would not say—I don't know about the letters, but in my personal conversations, where they would tell me they can't give me first-run, why, then I would ask for second-run. They would tell me about that, that that was not possible, and then I would tell them about the carry-over policy, would be a good policy.

[fol. 2659] Q. You recall that you just testified under cross-examination that in those letters that you wrote you spoke about the same subject you spoke with the managers about, first-run, second-run or carry-overs?

A. No——

Q. One moment. You recall you said that, do you not?

A. Yes.

Q. Let me show you this letter and ask if this is your signature?

A. Yes.

Q. That is your signature?

A. Yes.

Q. That letter bears date December 23, 1939, does it not?

A. Yes.

Q. That is the letter you are talking about that you sent to the exchanges?

A. Yes.

Mr. Rogers: I wish to offer in evidence only the third paragraph of that letter, may it please the Court.

Mr. Wright: I don't see any objection.

Mr. Rogers: There being no objection, it is just the third paragraph.

(Third paragraph of letter purported sent by witness Martina to branch managers received in evidence and marked Defendants' Exhibit D-113.)

[fol. 2660] Mr. Rogers: Now, this letter bears date December 23rd, 1939. It is addressed to Paramount Pictures, Inc., 464 Franklin Street, Buffalo, New York, on the stationery of Martina Circuit and is signed by C. V. Martina and reads:

"With your co-operation and that of the producer-exhibitors in that city, we should have no trouble to obtain

only 52 pictures first-run to take care of our requirements. This, of course, if every distributor releases to us five or six pictures each during the course of any one year."

Q. Now, when you said in that letter "With your co-operation and that of the producer-exhibitors," did you mean that you knew that a number of these producers were likewise exhibitors in Syracuse and had their own theatres?

A. What I possibly had in mind was Loew's and Metro-Goldwyn-Mayer productions.

Q. You said producer-exhibitors; therefore, you meant more than one company, didn't you, and you have got a hyphen between producer and the word exhibitors.

A. Well, when I write a letter——

[fol. 2661] Q. No, answer my question, isn't that exactly what you meant, that you knew that some of the producing companies also had theatres?

what you meant, that you knew that some of the producing companies also had theatres?

A. Well,——

Q. Let me finish my question.

Mr. Kallis: Just a moment. I am sorry. I thought you were through.

The Court: Did you know that other producer companies in Syracuse——

The Witness: You see, your Honor, unless I say what I got to say I can't answer his question.

Mr. Rogers: It seems to me that your Honor's question is very clear and a simple question.

The Court: What did you have in mind?

The Witness: You see, when I write a letter I write one way for everybody. The only thing different would be the address. Therefore, the letter had to be good and understandable to the Loew's Company as it would be to the Paramount manager.

The Court: That does not quite meet the case. You are referring to a number of exhibitors in Syracuse. If there were one, you would write it the same way?

The Witness: The same letter went to Ralph Maw of Loew's.

[fol. 2662] The Court: Did you know of more than one producer-exhibitor in Syracuse?

The Witness: I knew that R. K. O. is a producer, too.

The Court: And exhibitor?

The Witness: They are both.

By Mr. Rogers:

Q. You knew that R. K. O. was both a producer and exhibitor?

A. Yes, sir.

Q. You knew that Loew's was both a producer and exhibitor?

A. Yes, sir.

Q. You knew that Paramount was both an exhibitor and producer, didn't you?

A. In Syracuse?

Q. Yes.

A. No, I didn't know.

Q. Didn't you know there was a theatre in Syracuse called the Paramount Theatre?

A. I didn't think Paramount had anything to do with it.

Q. But you knew nothing about it, you merely thought so, is that it?

A. All I knew was, I thought Loew's operated the Loew's and Schine operates the rest of them.

Q. Didn't you know the Keith Theatre was an R. K. O. theatre?

A. No, from my understanding Schine operates them and runs them, and that is just the name of the theatre.

[fol. 2663] Q. That is what you thought, isn't that right, that is what you thought?

A. For the Keith's, yes, sir.

Q. But you didn't know?

A. No.

Q. Didn't know it was an R.K.O. house, did you?

A. No.

Q. Didn't know that. Now, before you made your deal on the Empire Theatre, you had several talks with Mr. Fred Gardiner, who was the local agent for the Massachusetts Mutual Life Insurance Company, didn't you?

A. Yes, sir.

Q. And he was the gentleman with whom you negotiated the lease for the Massachusetts Mutual Life Insurance Company, isn't that right?

A. Yes, sir.

Q. And do you remember at the time that you negotiated

that lease with him and prior thereto, you told him that you had $30,000 in cash that you were going to put into that house by way of renovation?

Mr. Kallis: If the Court please, I object to that, because it doesn't relate to any question on direct-examination. Well, I will withdraw the objection.

Q. Answer the question, please.
[fol. 2664] A. I don't remember what went on all during that period, I can't remember.

The Court: No, he is asking what you told the representative of the Massachusetts Insurance Company, whether you had $30,000 to put in?

The Witness: The original deal——

Q. No, please answer that question.
A. Well, I can't remember.
Q. You don't remember whether or not you told him that you had $30,000 in cash to put into the renovation of that house?
A. No.
Q. Do you remember whether you told him you had a substantial sum of money in cash ready to put in to renovate that house?
A. Yes, sir, I told him that.
Q. Did you tell him how much?
A. No, I don't remember the amount.
Q. Don't remember whether—did you tell him you had at least $20,000 in cash to put into the renovation of the house?
A. I know what I put in, but I don't know——
Q. I am asking you, do you remember what you told him you had to put in?
A. No, I don't remember it.
[fol. 2665] Q. Don't remember. Do you remember after you made your lease, or shortly prior to the making of the lease that you took up with Michael D'Angelos, an architect, about him preparing plans and specifications for the alteration of the house and getting bids from contractors to do the job, remember that?
A. Yes, I remember that.
Q. Do you remember Mr. D'Angelos telling you that in an operation of that kind, which would involve quite a substantial sum of money, he wanted to know what your resources

were, how much you had on hand before he would go ahead and draw any plans or let out bids for contractors?

A. Well——

Q. No. Don't you remember that happening, I am asking you?

A. He may have. I don't rely on D'Angelos, because he is not honest himself.

Q. Regardless of Mr. D'Angelos, I am asking you, didn't that actually happen, didn't Mr. D'Angelos tell you before he proceeded with plans and before he proceeded with letting out bids to contractors, to bid on the job, that he wanted to know what you had by way of cash to put into the job, isn't that so?

A. Well, I didn't tell him.

[fol. 2666] Q. Didn't he ask you that?

A. No, he led me——

Q. Just one moment, did he ask you that?

A. No.

Q. Didn't he ask you anything about what your financial resources were, you mean?

A. No.

Q. Didn't you tell Mr. D'Angelos you had $30,000 in cash?

The Court: You mentioned that before.

Mr. Rogers: No, it was Mr. Gardiner I spoke of before.

Q. Didn't you tell Mr. D'Angelos you had $30,000 in cash?

A. No, I didn't tell him that because he owed me money.

Q. I am asking you, didn't you tell him that? During the first week that the theatre, the Empire, I am talking about now, was in operation, were you in Syracuse?

A. During the first week?

Q. That the Empire was in operation in the month of March, were you in Syracuse?

A. Yes, sir.

Q. How much of that week?

A. I believe I went to Albion a couple of days.

Q. I am talking about Syracuse now, not Albion.

A. Yes, but you are asking if I was in Syracuse.

The Court: He was in Syracuse and Albion a couple of times, you mean you went back to Albion a couple of [fol. 2667] days?

Q. I want to know how long you were in Syracuse, not how long you were in Albion.

A. If I was in Albion two days, that makes five days in Syracuse, don't it?

Q. I don't know. I want to get how many days you were in Syracuse during the first week of the operation?

A. To the best of my recollection I can't tell you how many minutes and days, I believe I went to Albion two days.

Q. You mean you were in Syracuse five days during the first week of operation?

A. Yes, sir.

Q. How many days were you in Syracuse the second week of the operation?

A. About the same.

Q. Five days?

A. Yes, sir.

Q. As a matter of fact, were you in Syracuse at all during the second week of the operation?

A. Yes, must have been, my Lord, I don't see——

Q. Don't tell me what you must have been; tell me, were you in Syracuse during the second week of the operation?

A. Gosh, I don't know, why I shouldn't have been.

Q. Don't tell me why you shouldn't have been, tell me if [fol. 2668] you were or were not in Syracuse at all.

A. Must have been.

Q. It is your best recollection that you were?

A. Yes, sir.

Q. Do you know how many days you were in Syracuse the second week?

The Court: He told you about the same.

Mr. Rogers: He changed it several times, and I would like to get something definite.

The Witness: To the best of my recollection I would go a couple of days to Albion to catch up with my work and get home with the family and get back, I don't remember anything else.

Q. Do you remember the attraction you played in the Empire Theatre the second week?

A. I believe it was "Happy Felton", and a cow-boy picture.

Q. Right. Don't you recall that during that second week you didn't have enough money to pay "Happy Felton", and

Mr. Gardiner had to send you a wire to send money on to take care of the "Happy Felton" band's money; don't you remember that?

A. It is possible.

Q. Well, based on that, wouldn't that refresh your recollection that you weren't in Syracuse?

Mr. Kallis: If the Court please, I object to the form of [fol. 2669] the question. He has already definitely stated he was in Syracuse.

The Court: Well, in view of the subsequent inquiry I will let him state now whether he wants to change his testimony in that respect, whether you were in Syracuse the second week or not.

The Witness: When we paid the excise——

Q. No, no, just answer that question.

The Court: You said some time ago you were in Syracuse about the same time you were in the first week of your activities. Counsel is calling your attention to a telegram and wants to know if that refreshes your recollection.

The Witness: It may be. I was in Albion, maybe at the same time it was pay night and they wired me for the money.

Q. Won't that refresh your recollection you weren't at Syracuse at all during the second week?

A. Oh, I was there.

Mr. Kallis: If the Court please, I submit the question has been answered.

The Court: He said he was there.

Q. With reference to the third week, were you there at all?

A. Yes, sir.

Q. What was the attraction the third week?

[fol. 2670] A. Bob Crosby and band, and this "Lion Had Wings".

Q. You are sure you were in Syracuse that third week, eh?

A. Yes, sir.

Q. Did you speak to Bob Crosby?

A. Yes, sir, I see him.

Q. In the theatre?

A. Yes, sir.

Q. During that third week?

A. Yes, sir.

Q. What was the conversation about?

Mr. Kallis: I object.

The Court: Sustained.

Mr. Rogers: I only——

Mr. Kallis: Just a moment. The Court has sustained the objection.

Q. As a matter of fact, in that third week, didn't Mr. Gardiner have to make a deal with Bob Crosby allowing Bob Crosby to put somebody in the box office of the theatre to collect his money in the box office because you weren't there to make any deal?

Mr. Kallis: I object to that, if your Honor please.

The Court: Overruled. Did that happen?

The Witness: Yes, that happened in the latter part of the week, just about the time they were ready to get paid.

[fol. 2671] Q. Now, when you left Syracuse after playing the three weeks and six days, you have testified to, had you paid for the alteration that was done to the theatre?

A. Yes, quite a bit of it.

Q. How much of it?

A. About $30,000 or so.

By Mr. Kallis:

Q. How much was that, Mr. Martina?

A. About $30,000.

Q. You had paid, you say?

A. Well, of course, that includes legal fees and things like that.

By Mr. Rogers:

Q. Never mind about legal fees, I am asking you, did you pay the contractors and sub-contractors who did the work on the Empire Theatre?

A. Not in full, no.

Q. How much did you pay them?

A. Well, I owed the contractor about $5800, if I recall right, out of—I don't know how much, it was a cost plus job, so I don't know whether the remodeling cost $30,000 or $40,000, or what, I don't know.

Q. Do you know how much you paid to the contractors?

A. I paid him what I owed him except $5800.

Q. Will you please tell me how much you paid him?
[fol. 2672] A. I couldn't say.

The Court: Do you know how much, substantially, you paid for the repairs?

The Witness: I can't remember, your Honor, what the repairs as a whole were. I might in round figures what the equipment and things cost.

The Court: What do you mean?

The Witness: I can't remember what I paid the contractor. I happened to remember the balance due him, $5800.

Q. You said that the alterations amounted to about $50,000?

A. About $55,000.

The Court: Did that include equipment, or just alterations?

The Witness: No, the equipment, seats and alterations.

By Mr. Rogers:

Q. Then you mean you paid over $40,000 for the alterations and equipment, actually paid it, I mean?

A. No, my loss up to date is about $35,000. Therefore, I could not have paid any more than that.

Q. You claim you actually paid $35,000 to these people for alterations and renovation and equipment?

A. Yes, sir.

Q. To whom did you pay it?

[fol. 2673] A. Well, to—I got a list a mile long.

Q. Have you got that list with you?

A. No.

Q. Didn't you bring it with you?

A. I may have.

Mr. Kallis: Ask him if he has it, Mr. Rogers.

Mr. Rogers: I am asking did he bring it here.

Q. Did you bring it with you?

A. No, not the list of creditors.

Q. When did you pay this money, before you left Syracuse, or after you left Syracuse?

A. A lot of it was paid before the opening and quite a bit during the opening. You see, during the three weeks we took in $21,000 in those three weeks. Of course, paying

for the act and all, and what was left over I paid some of the bills.

Q. You just testified that in the second week of the operation you didn't have enough money to pay, and you got a wire from Gardiner, didn't you?

Mr. Kallis: If the Court please, I don't understand he testified he did not have enough money.

Mr. Rogers: He did.

Mr. Kallis: I understood he might not have been in Syracuse at the time and a wire was sent.

The Court: That was the second week.

[fol. 2674] Q. The second week that was. As a matter of fact, you didn't take in enough money at the box office to pay Felton, and you got a wire for money to pay Felton?

A. You see——

Q. Isn't that so?

A. What?

Q. You didn't have enough money in the box office to pay Felton at the end of the week, and you got a wire and sent money on to pay Felton, isn't that so?

A. That is possible.

Q. Now, then, how much money of the first week's box office receipts do you claim that you paid to contractors?

A. Well, now contractors, I paid that out of my money, not out of the box office, but little bills and different things the manager paid right out, like small items or like a contractor had a $300 or $400 contract for the lobby floor, or something, the manager would pay that.

Q. But, Mr. Martina, didn't you just testify that out of the money you took in at the box office, you paid these contractors?

A. Not any substantial amount, small amounts to small contractors, like a lobby floor man, something like that.

Q. You mean a couple of hundred dollars here and a couple of hundred dollars there, is that what you are talking about?

[fol. 2675] A. Yes, that all added up, of course.

Q. What I am asking about is this amount of $50,000 that was due those contractors; what part of that did you pay before you opened at Syracuse, if any?

A. About $25,000, maybe.

Q. And out of what funds did you pay that?

A. That is equipment and everything.

Q. That is what I am talking about. Out of what funds did you pay that?

A. That was my funds.

Q. Where were those funds?

A. What do you mean?

Q. Where did you have that $25,000?

A. I didn't have it under the mattress.

Q. I am just asking you a simple question; where did you have that $25,000? Did you have it in the bank?

A. Well, in various banks. Maybe there was some interest account that we took out and put in a checking account.

Q. Please tell me in which bank account you had an aggregate of $25,000 in the fall of 1939?

A. I can't remember, because it was different amounts, like maybe $1,000 or $2,000 in Mount Morris, some in Batavia, some in Rochester, I don't know.

Q. You really don't know, do you, in which bank did you have at least $10,000 at that time?

[fol. 2676] A. Well, in a checking account——

Q. No, no. Just answer my question.

The Court: State the bank in which you had at least $10,000?

The Witness: I don't believe I had any $10,000 in a checking account unless there was a bill due and then I would deposit and make out a check.

Q. Please answer my question. Did you have $10,000 in any bank at that time?

A. In any one?

Q. Yes.

A. No, not in any one, no.

Q. Did you have $5,000 in any one bank at that time?

A. Yes, because the contractor, I believe——

Q. Don't tell me "because," tell me, did you have $5,000 in any bank account at that time?

A. Well, to the best of my recollection I must have.

Q. Well, will you tell me the name of the bank?

A. Well, the Marine Midland Bank of Albion, or the—— I don't even remember the Syracuse capacity, I mean, the bank, I don't know what the name was.

Q. Well, give me the name of a group of banks in which you had $25,000 at that time?

A. Well, we had some money in the Union Trust Com-
[fol. 2677] pany, Rochester; First National Bank, Batavia, Genesee River National Bank, Mount Morris and Marine Midland, Albion. Of course, my wife had some of it.

Q. One moment now——

The Court: When you say "we," you mean yourself and wife?

The Witness: Yes, your Honor, you know some money was in her account.

Q. In which banks?

A. In the various banks I have mentioned.

Q. Was this all your wife's money, you mean, in these various banks that you have mentioned?

A. No, some of it was in a combination of names. Some was hers and some was mine alone, and different.

Q. When you say "combination of names," what do you mean by combination of names?

A. Like "Charles Martina and Sarah Martina," and some were just "Charles Martina."

Q. Take these five banks you mentioned just now, is it your testimony that in the winter of 1939 or January or February of 1940, that there was at least $25,000 in those banks in the aggregate?

A. Well, I don't—I can't say how many thousands, I know how much we paid out.

Q. No, no. Please answer my question. Was there at
[fol. 2678] least $25,000 in the aggregate in those five banks you have mentioned?

A. I don't know, if you mean all at one time——

The Court: At this time.

Q. At that time I am talking about.

The Court: In the few months there, September to January.

The Witness: I don't remember now.

Q. Now, with reference to the payment of that $25,000 prior to the opening, was that paid by check?

A. Yes, most of it unless there were like I said, a lot of bills the Manager paid, like the lobby floor man, or the fellow that scraped the stage, you know several hundred bills, and bills of that kind he paid cash.

Q. I am not referring to those little bills of a couple of hundred dollars apiece. I am talking about the $25,000 worth of payments you testified to. Were those made by checks?

A. Yes, mostly.

Q. And who signed those checks?

A. Well, when they forced me into bankruptcy——

Q. No, no. Who signed the checks is all I am asking you.

A. Well, I signed them.

Q. You signed them all?

A. Yes, sir.

[fol. 2679] Q. Have you those returned check vouchers showing payment of $25,000 before you opened the house?

A. To be frank with you, my records are all over creation, all different lawyers, courts, bankruptcy, I can't find everything I want to find. I could not find all my statements of the theatre box office. I have it for maybe two and a half weeks, and I don't know where the others are.

Q. Mr. Martina, I am only asking you about those checks you paid to these contractors and sub-contractors on the Empire Theatre.

A. As I said, I can't get them together.

Mr. Kallis: If the Court please, he has answered the question.

The Court: I believe he said "I don't know where they are." Do you keep books of account?

The Witness: Yes, your Honor, but I have had so many bankruptcy meetings, every lawyer seemed to grab some of the stuff. Everybody has got them except me.

The Court: You kept account of your receipts and disbursements?

The Witness: Yes, sir.

The Court: They were the subject of bankruptcy proceedings?

[fols. 2680-2682] The Witness: Yes, sir.

The Court: And everything was turned over on the bankruptcy?

The Witness: Yes, some were turned over to the auditor, some to the referee in bankruptcy and some are lawyers who would pretend there was a mistake and would take some of the books and some of the canceled checks and everybody has got them but me.

By Mr. Rogers:

Q. Is it accurate to say that these payments of $25,000, that you say were made to the contractor prior to the opening of the Empire at Syracuse, were drawn out of the five banks you testified to, is that right?

A. Yes, sir.

The Court: I think we will have to suspend at this time.

Mr. Rogers: Very good.

(Whereupon a recess was taken until Thursday, October 12th, 1944, at 10 o'clock a. m.)

[fol. 2683] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223

UNITED STATES OF AMERICA

vs.

SCHINE CHAIN THEATRES, INC., et al., Defendants

Continuation of trial before Honorable John Knight, United States District Judge for the Western District of New York, October 12th, 1944, 10 o'clock A. M.

APPEARANCES:

Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Special Assistants to the Attorney General, and Milton Kallis, Esq., Special Attorney, in behalf of the United States.

Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homans, Esq., and Howard M. Antevil, Esq., appearing for the Defendants.

[fol. 2684] PROCEEDINGS

(Reporter's Note—Corrections:

The following corrections are to be made in the record:

Page	In record	Correct spelling
1503	Birge	Berge
1504	Diller	Dillard
1505	Conners	Connors
1516	McAvoy	McEvoy
1523	McAvoy	McEvoy
1570	Gratwell	Gradwell
1574	Lasserman	Lesserman
2553-11	Berg	Berk
2613	Sampson	Samson
2614	Sampson	Samson
2615	Sampson	Samson
2626	Bill Fox	Phil Fox)

Mr. McClennen: If your Honor please, on reading the record, I observe on page 2654 this question to Mr. Martina: "Didn't you know as a fact that the Keith Theatre was an RKO Theatre?" "A. Well, for all practical purposes I considered it a Schine theatre, because they buy and they [fol. 2685] manage it, and they are the ones that drive other people out of business."

I move that that answer be stricken from the record.

Mr. Kallis: There was no objection made at the time.

The Court: I do not think it is properly a part of the record. That is the thing we are trying to find out.

Mr. Kallis: That is the issue in the case.

The Court: I think it should be stricken. I thought at the time you did move to strike it.

Mr. Kallis: Several objections were made, and I stipulated that the answers go out, because they were improper and not responsive.

The Court: Yes, I recall that.

CHARLES V. MARTINA resumed the stand on behalf of the Plaintiff, having been previously sworn, was examined and testified further as follows:

Cross-examination (continued).

By Mr. Rogers:

Q. Mr. Martina, you testified at page 2653 of the record yesterday, when interrogated as to which were the first-run theatres in Syracuse at the time you made your deal on [fol. 2686] the Empire, that they were Loew's, Keith's, Paramount, the record said "Echo"—you meant Eckel, did you not?

A. Yes.

Q. The Strand and the Empire?

A. Yes.

Q. Was the Empire Theatre at that time a first-run theatre?

Mr. Kallis: Just a moment. Mr. Rogers, what particular time. It is not clear.

Mr. Rogers: I fixed the time in my question, if you listen to my question. At the time he was negotiating for this Empire Theatre.

A. What I probably meant was down-town theatre.

Q. You did not mean the Empire, did you?

A. For down-town, yes.

Q. You meant the Empire Theatre was a first-run theatre?

A. No, a down-town theatre.

Q. Please answer me.

The Court: The question is directed to the Empire. Was that a first-run house?

The Witness: Not before I got it, your Honor.

Q. As a matter of fact, right before you got that theatre, when it was being run as you testified as a house playing Bingo and a miscellaneous run of pictures, its admission prices were only 10 and 15 cents, were they not?

[fol. 2687] A. I believe they were 25—20 and 25.

Q. That is what you believe, is that right?

A. Yes, to the best of my recollection, that is what I think.

Q. Do you know definitely what the price of admission was that was being charged at that house right before you took over the Empire?

A. For Bingo they charged a dollar, on Bingo nights.

Q. When they had Bingo and only Bingo, and the public came in just to play Bingo, they charged a dollar to play Bingo, is that what you mean?

A. They played pictures with Bingo.

Q. But the Bingo admission price was a dollar, because the public played Bingo and won big prizes, isn't that it?

A. Yes.

Q. With straight pictures that house only charged 10 and 15 cents, did it not?

A. I believe it was 25. Maybe the matinees, but the evenings, I believe, were 25.

Q. That is your belief, but you don't know, do you?

A. I don't know for sure.

Q. When you were making your investigation of the lay-out of the town of Syracuse, before you had your first talk with the branch managers of these various companies in October of 1939, you knew that the Loew Company was operating the State Theatre in Syracuse, did you not?

[fol. 2688] A. Yes.

Mr. Kallis: If the Court please, I object to that, because my direct examination was directed, as I recall, solely to the question of the difficulty of obtaining product, and what he understood Loew's were playing before that I don't think has any relationship to his direct examination.

The Court: I think he testified yesterday the fact that Loew's was operating that theatre.

Mr. Rogers: But I want to get at the product.

The Court: The purposes of the inquiry is proper. It is competent, if he is able to answer it.

Mr. Rogers: Exactly, sir. May we have the question?

(Question and answer read.)

By Mr. Rogers:

Q. You knew that they were playing first-run major product in that house, did you not?

A. Yes.

Q. Did you inquire as to what major product the Loew's State Theatre was playing at that time?

A. Yes, I knew.

Q. You knew what product they were playing, did you not?

A. Yes.

Q. What products were they playing first-run?

[fol. 2689] A. Metro-Goldwyn-Mayer, United Artists and Columbia.

Q. And then you say the so-called Schine theatres were playing all the products——

A. Yes, they played all the rest of them.

Q. That is, Warner?

A. Warner.

Q. Fox?

A. Paramount, 20th Century-Fox, RKO, Universal, Republic, Monogram and other independents.

Q. I was talking about the eight majors.

A. Oh.

Q. Of the major product, they played Warner, Fox, Universal, RKO and Paramount, did they not?

A. Yes.

Q. The so-called Schine theatres consisted of four theatres, did they not?

A. Yes.

Q. That was the Eckel, Keith, the Strand and the Paramount?

A. Yes.

Q. And they played those products first-run, that you just mentioned?

A. Yes.

Q. So that at that time, as the first-run product was divided, Loew's had three and the so-called Schine theatres had five major products of the eight; is that right?

A. Yes.

[fol. 2690] Q. Now, you have been engaged in the theatre business for, as I understand it, about 26 years, is that right?

A. Yes, sir.

Q. And you have been accustomed to buying product for theatres during that period, haven't you?

A. Yes, sir.

Q. Now, with reference to first-run product, what was the custom in 1939, with reference to the offering of first-run product to the exhibitor, when did the sales season begin?

A. Usually in September.

Q. As a matter of fact, the sales were concluded by September, weren't they?

A. Well, not necessarily.

Q. On first-run product?

A. No, not necessarily.

Q. Wasn't first-run product usually offered about July or August?

A. It was offered, but that didn't mean it was bought then.

Q. Weren't the transactions practically closed by September?

A. Well, the majority, probably.

Q. That is so, isn't it?

A. Yes, sir.

[fol. 2691] Q. Now, when you went to the Loew's Branch Manager, in October of 1939, and you asked for first-run product, didn't he tell you that they had already closed their deal for first-run product for that season with the Loew's Theatre, the State Theatre?

A. His statement wasn't—he didn't commit himself too clearly because he said to me "Charlie, I can't——

Q. No, I am asking you a simple question. Didn't he tell you that product was closed to be played at the Loew's State Theatre?

Mr. Kallis: If the Court please, I submit he has answered the question. He said he didn't commit himself too clearly.

The Court: Overruled. Did he tell you that?

The Witness: Because——

Q. No, just tell me, didn't he tell you that?

A. Yes, he told me that Metro was running at Loew's.

Q. Now, with reference to Columbia, weren't you told in October, by the Branch Manager, that Columbia had Loew's as its regular first-run customer at the State Theatre?

A. Not all pictures, Schine had some Columbia.

Q. You say you were told in October, 1939, at Columbia that Schine had some of Columbia's pictures first-run?

A. Yes, sir, at times they would.

[fol. 2692] Q. Is that what you were told, I am asking you?

A. I can't recall, but I know the Columbia pictures——

Q. No, no. I am asking what you were told? Did anybody tell you that?

A. I wouldn't remember clearly at this time.

Q. You wouldn't, eh? You knew at that time Columbia was serving the State Theatre as its first-run account in October, 1939, didn't you?

A. Yes, mostly the A pictures, though.

Q. Now, with reference to United Artists, when you went there in October, 1939, weren't you informed by them that Loew's was their first-run customer and had been right along?

A. Yes, I believe they did.

Q. Now, by the time you arrived at October of 1939, and had spoken to these various managers, you knew at that time that the probabilities were that the first-run product of all eight companies had already been committed for that season, didn't you?

A. Yes, but I——

Q. One moment, "Yes" is the answer. All right. And surely by December of 1939, when you went to see these branch managers, you knew that the first-run product for the season 1939-40 had been sold, didn't you?

A. Yes, sir.

[fol. 2693] Q. Now, knowing in December of 1939 that the first-run product had been sold, did you make any inquiry either in October or in December with reference to who was the second-run customer in Syracuse?

A. I was told by the same exchange managers that Kallett was the second-run.

Q. And Kallett was operating a theatre in Syracuse known as the Regent Theatre, wasn't he?

A. Yes, sir, in the College district.

Q. Regardless of where it was, he was operating the Regent Theatre, wasn't he?

A. Yes, sir.

Q. And you were told by all eight companies that he was the second-run account, weren't you?

A. Yes, sir.

Q. By the time you had reached the month of December, 1939, had you spoken to these branch managers, or, rather, strike that out, please. In October of 1939, did you ask these branch managers what their situation was with Kallett with reference to the second-run product for 1939-40?

A. Well, it wasn't stressed by either party because of the fact that I didn't have a lease.

Q. Did you ask them whether the second-run had been sold by that time, in October of 1939?

[fol. 2694] A. I was interested in first-run.

Q. Just simply answer my question. Did you ask them whether or not the second-run product had been sold in October of 1939?

A. I don't think I asked that at that time.

Q. Well, when you saw them in December of 1939, did you ask them whether or not they had sold their second-run produce to Kallett?

A. I perhaps did at that time.

Q. And you were told they had sold Kallett the second-run for that season, weren't you?

A. Perhaps.

Q. Isn't that so?

A. I am not positive.

Q. But you think so, don't you?

A. I think so.

Q. Now, you were talking about move-overs or carry-overs; the term "move-over" and "carry-over" is used interchangeably in the industry, isn't it?

A. Yes, sir.

Q. And by a "move-over" is meant taking a picture that plays at an exhibitor's first-run theatre and the night it finishes the first-run it is moved over to another theatre owned by that same exhibitor and opens the next day, isn't that right?

[fol. 2695] A. Yes, sir.

Q. Now, you had no first-run theatre in Syracuse, did you?

A. Yes, I did for four weeks, but it was first-run.

Q. I mean, at the time you spoke in October or December; you had no first-run theatre in Syracuse, did you?

A. As a matter of fact, I didn't have any theatre at all.

Q. That is what I mean; you had no theatre at all?

A. Yes, sir.

Q. So discussing "move-overs" by you was just an idle ceremony, wasn't it, because you had no move-over theatre in which to move-over pictures after the first-run?

Mr. Kallis: Just a moment, I object to "Idle ceremony" as a characterization.

The Court: State whether you had a first-run theatre.

The Witness: Your Honor, I didn't have a lease until January, so in the latter part of December I didn't.

The Court: So, according to the definition, you could not carry over or move over from one to the other?

The Witness: I didn't have no theatre at that time.

The Court: I think that is clear.

By Mr. Rogers:

Q. Well, now, you knew in December that first-run was [fol. 2696] out of the question as you testified and now you testified you knew second-run was out of the question because Kallett had it, and you made your lease in January after knowing that. Now, what kind of pictures did you propose to play in the Empire Theatre when you opened it?

A. All companies release about 50 pictures during that time.

Q. I asked you what kind of pictures you expected to play?

A. I expected to play about five or six pictures from each and every company, and that would be giving me my 50 pictures a year.

Q. In other words, you knew that the companies were obligated for first-run, and you knew that the only first-run that you could get, after you opened the Empire Theatre, were pictures that weren't played either at Loew's theatre or the so-called Schine, is that right?

A. Yes, sir.

Q. And those were exactly the pictures you got when you opened, weren't they, is that right?

A. Yes, because——

Q. That is all I want to know.

Mr. Kallis: Now, do you have to explain your answer?

Mr. Rogers: One moment, please, Mr. Kallis.

The Court: The point of counsel is that your redirect [fol. 2697] examination can take care of the situation.

Mr. Kallis: My point, your Honor, is that sometimes an answer cannot be unqualifiedly given and if an explanation is made, I think your Honor is interested in knowing it.

The Court: That is the purpose of redirect examination.

By Mr. Rogers:

Q. And the various pictures you did get, when you ran for the three weeks and six days were all first-run pictures, weren't they?

A. Yes, sir.

Q. And they were just that kind of picture, weren't they, that they could release from their first-run accounts?
A. They were rotten pictures.

Mr. Rogers: I move to strike that out.
The Court: Yes. Were they first-run pictures?
The Witness: The first time shown in the city, yes.
The Court: All right.
Mr. Rogers: That is all.

Redirect examination.

By Mr. Kallis:

Q. Mr. Martina, since court adjourned yesterday afternoon, have you had an opportunity of checking any records [fol. 2698] at home or anywhere since you left the courtroom?
A. Yes, sir. I have a partial list of some bills that I paid before March 23rd, before I opened the theatre.
Q. Will you please tell us what they were?
A. I paid—am I allowed to use the list, your Honor?

The Court: Yes, what you paid you can state; you mean in connection with your purchase or repair of this theatre?
The Witness: Before the opening date I paid—this is a partial list that I added up, and I have the canceled checks on all of those in my pocket except——
The Court: Is that what you paid?
The Witness: I paid $18,983.27.

Q. $18,983.27?
A. Yes, sir.
Q. Can you specify what those bills were for?
A. The checks are in my pocket. That is the only way I could tell you what they were.

Mr. Kallis: I haven't talked with this witness, your Honor, since he was on the stand, and I don't know just exactly what he has in mind. May I see them, Mr. Martina? Let me see the checks.

The Witness: They are in my coat pocket on the hook. [fol. 2699] Mr. Kallis: You may step down and get them.

(Whereupon the witness left the stand and returned with a bundle of checks which he handed to Mr. Kallis.)

Q. Mr. Martina, will you please tell the Court what those items—strike that out. You say you paid $18,983.27 before the theatre opened?

A. Yes, sir. That is only partial. I could not find everything, because they are in the Bankruptcy Court.

Q. All right. These expenditures without exception were all made in connection with the Empire Theatre in Syracuse?

A. Yes, sir.

[fol. 2700] Q. You have those expenditures enumerated, do you?

A. Yes.

Q. Will you look at your memorandum and tell the Court what they were, if you know?

The Court: The items, you mean?

Mr. Kallis: Yes, in order that your Honor may understand when these checks are introduced in evidence just what they covered. It is not apparent to me in some instances.

The Court: They show themselves, by the check, if the checks are introduced.

Mr. Kallis: Some of the payees are unknown to me, but I am perfectly willing——

The Court: Does it state on the check what it was for, or just the payee?

The Witness: It gives the payee only.

By Mr. Kallis:

Q. You say every one of these was made in payment of something connected with the Empire Theatre?

A. Yes.

The Court: Does that mean operation or for equipment—I mean, capital expenditures?

The Witness: It means equipment and remodeling and advance rent to the Massachusetts Mutual, and everything [fol. 2701] pertaining to get the theatre in readiness.

The Court: Just to get it in readiness?

The Witness: Yes.

By Mr. Kallis:

Q. Mr. Martina, can you tell the Court whether any or this $18,983.27 covered architects' fees that you actually paid?

A. Yes.

Q. You say that all of those eighteen-thousand-some-odd-dollars is represented by checks or are there items of expenditure not represented by these checks?

A. There is one check I could not find. That was to the Massachusetts Mutual for one month's rent of $1250. I could not find that. And there was another check to the architect of $1000 that I could not find. Those two items were kind of large, and I remember them, but I could not find the checks.

Q. As near as you can recall, and from an examination which you made last evening since court adjourned, are there any other items of expenditure concerning which you were not able to find any checks?

A. Yes, there is others.

Q. Are they included in the eighteen thousand?

A. No, they are not included in the eighteen thousand.

The Court: He stated two. What others do you mean [fol. 2702] besides the two?

The Witness: Those two were included in the $18,000, the architect and rent of $1250.

The Court: All right. Were there any additional expenditures that are not represented by these checks?

The Witness: Yes, there were.

The Court: Other than the two you have named?

The Witness: Yes, there were, but they are not accounted for in the addition.

By Mr. Kallis:

Q. Can you tell us what they are, Mr. Martina?

A. Well, there is different things that were paid in cash, and things that——

Q. According to your best present estimate how much would they amount to?

A. Before the theatre opened, a couple of thousand, more than that, perhaps.

Q. Your statement is that you can definitely state now that there was about $21,000 in cash advanced by you——

A. Yes, before the opening.

Q. Before the theatre opened?

A. Yes.

Mr. Kallis: Do you want to see these checks, Mr. Rogers?

Mr. Rogers: Yes, very much.

Mr. Kallis: Keep them intact.

[fol. 2703] By Mr. Kallis:

Q. Mr. Martina, relative to your operation of the Rialto Theatre in Albion, New York, I understood you to say you had operated that for twelve years?

A. Yes.

Q. Did you ever have any difficulty obtaining product for that theatre?

Mr. Rogers: I object to that.

The Court: Sustained.

Q. Please tell the Court what product you played at the Rialto Theatre in Albion.

Mr. Rogers: I object to that.

The Court: I do not see its materiality.

Mr. Kallis: I am offering by this question, your Honor, to show that where he did not have Schine competition he had no difficulty in getting any of the eight major——

The Court: It would be the whole circumstances. No, I don't think it is competent to show it in connection with some other place not involved here, unless there is some circumstance related to the circumstances claimed here.

By Mr. Kallis:

Q. There was some discussion in cross examination with [fol. 2704] regard to your hoping for a hold-over run in your Empire Theatre. When did you hope to have that hold-over run, before or after you opened your theatre?

Mr. Rogers: May it please the Court, that is objected to. That is speculative and remote.

The Court: The definition of "carry-over" or "hold-over," as I understood it to be stated here, if applies only to the instance or case of somebody who has a run and continues that run in another of his theatres.

Mr. Kallis: That is right.

The Court: That would not be applicable. How could that be applicable here where one has only one theatre?

Mr. Kallis: No, now, this is my understanding, your Honor,——

The Court: I am just giving the definition of "carry-over" and "hold-over" as made here before, that is all.

Mr. Kallis: My understanding is, and I think Counsel will stipulate on this point, that Loew's State was playing in

Syracuse was playing three products, Columbia, Metro, United Artists. Mr. Martina, as I understand it, was requesting that that same product be transferred immediately, [fol. 2705] without any gap of time, to his Empire Theatre after he started operating.

The Court: That would not be the definition of "carry-over" or "hold-over" as heretofore mentioned. The use of the term has been applied here as relating only to the——

Mr. Kallis: One ownership?

The Court: Where a man owns two theatres and carries over from one to the other. Maybe I am in error.

Mr. Wright: I do not so understand the witness. If he did say so, I don't think it is in accordance with the fact. It is my understanding many hold-overs, where the hold-overs run, may occur in a theatre which is not owned by the owner or operator of the first theatre.

The Court: Ordinarily the term "hold-over" would be applied to somebody holding something over for himself.

Mr. Kallis: I understand there does not have to be any unity of ownership or operation between the two theatres involved. I think Counsel will stipulate. Are you willing to stipulate to that effect, Mr. McClennen?

Mr. McClennen: We are willing to stipulate that it is not [fol. 2706] so. "Hold-over" is used only with reference to playing in two theatres in the same ownership, one immediately after the other, and has no other meaning in the trade.

The Court: I will let you show what he had in mind by "carry-over."

Mr. Kallis: That is all I wanted to elicit.

The Court: I think construing the phrase in a normal way "carry-over" means somebody—applies to somebody carrying something over for himself, and "hold-over," the same. In other words, an independent party, a third party, could not hold over something somebody else had, or carry over something that somebody else had.

Mr. Wright: If your Honor please, I don't think the terms are important here. What I think should be understood is what the witness wanted to do. Whether you call it "carry-over" or "hold-over" I don't suppose is of much significance.

The Court: The witness himself has used the term "carry-over," and that is why—I will let him state.

[fol. 2707] Mr. Wright: I suppose we ought to know how he used it.

Mr. McClennen: The witness already testified this morning that that was the meaning.

The Witness: I did not.

The Court: I so understood.

Mr. Rogers: He did so testify.

The Witness: Your Honor, I did not mean carry-over, it has to be the same owner to carry a picture over into another theatre. That is their own definition. They make their own rules here.

The Court: He asked you the question about the Empire. You can state.

Mr. Rogers: Your Honor has the understanding of the situation.

By Mr. Kallis:

Q. Tell the Court what you had in mind.

The Court: What you mean by "carry-over" or "hold-over."

Mr. Rogers: Pardon me, your Honor. Might it not better be what the general understanding in the industry was as to the purport of that term?

The Court: I will let him state.

The Witness: A "carry-over" means that it is not necessarily a run, like second-run, which there is a lapse of time [fol. 2708] between the first-run of either seven days or fourteen days or thirty days, as the case may be. That is a second-run, if there is a space of time in between the first theatre that runs the picture and the second. But a "carry-over" means that that same night the picture moves over to the other—to another theatre—the following day, without any lapse of time.

The Court: To another theatre owned by another owner?

The Witness: Yes, that has been done.

Mr. Kallis: All right.

Q. Now, Mr. Martina, Mr. Rogers asked you about a custom to the effect that all product is bought usually during the month of September for the following season. Can you tell us whether——

Mr. Rogers: May I interrupt by saying I directed it only to first-run?

Q. First-run. Can you tell us whether there is a custom in the trade, Mr. Martina, as to not playing all of the product which is covered by a first-run contract?

Mr. Rogers: That is objected to as immaterial, may it please the Court.

Mr. Kallis: It is not immaterial, if any of these pictures [fol. 2709] were available, even though they had been contracted for.

The Court: Wouldn't you have to have the consent of the first person who had the first right?

Mr. Kallis: Yes, and I am asking whether any of those pictures which are covered by a contract are released by the exhibitor.

The Court: I will let him state.

Q. Can you tell us?

A. There are many instances where an exhibitor, in order to monopolize, will pay for pictures and not run them, and therefore the company can't sell them.

Mr. McClennen: May that be stricken out?

The Court: The answer is many pictures are bought and not played.

The Witness: Not played.

The Court: That answers it.

Q. Do you know whether there is a custom in the trade if a notice of availability for the playing of the picture is given by the distributor and not played by the exhibitor within the availability period, that that picture is released by the exhibitor?

Mr. McClennen: That is objected to as leading.

The Court: It would be for a year, wouldn't it?

Mr. Kallis: No, as I understand it, your Honor, let us take a picture like "The Song of Bernadette," the distribu- [fol. 2710] tor will notify the exhibitor who has it under contract that it is available for a certain period. It must be played within that period, otherwise the exhibitor loses the right to play it.

The Court: I will let him show whether it is the custom in the trade. That simply means, as you say, that it is made available for a certain period and might not be used, if it applies to a certain picture.

Q. Please tell the Court the custom.

A. The custom is usually, when a distributor makes a picture available, they must book it within a reasonable period of 60 days, because if they don't it holds up all the other theatres in the city or neighboring towns, and so forth.

Q. Did you have in mind playing any of those pictures at the Empire?

Mr. McClennen: That is objected to as leading and immaterial.

The Court: I will let him answer.

Mr. Kallis: Read the question.

The Court: Is that what you mean by procuring first-runs?

The Witness: I was in hopes that they would not play a lot of pictures, which they don't. They never see the screen, [fol. 2711] but they monopolize them.

Mr. McClennen: May that be stricken out, if your Honor please?

The Court: What is that?

Mr. McClennen: May that last be stricken out?

The Court: Yes, the "hope" may be stricken out. The answer was not responsive. I asked the question what class of runs you had in mind when you referred to "hold-over" runs.

Q. As I recall, you testified yesterday that you played five pictures?

A. Yes.

Q. Were they all first-runs?

A. Yes.

Q. Were any of those pictures rejects, using the term in the sense that it is used in the industry?

Mr. McClennen: That is objected to, because the witness could not possibly know whether it was rejected or not.

The Court: That is true, unless he has some personal knowledge from a person who had the right. In other words, if he was told by one of the purchasing exhibitors, he may state.

Q. Do you know whether any of these pictures—well, that [fol. 2712] is all.

Re-cross-examination.

By Mr. Rogers:

Q. Among these checks that Mr. Kallis was kind enough to allow me to scan, is it not true that the greater part of these checks were on the bank account of the Rialto Theatre of Albion, New York?

A. Yes, that is true.

Q. And those checks were issued in February and March of 1940, isn't that true?

A. I believe so.

Q. Look at them.

A. The rent check was December 11th of 1939.

Q. Is the rent check in there?

A. No, but I caught the stub. That is why I know the date.

Q. You mean the check missing there was issued in December for rent, was the only check issued in December, isn't that right?

A. Of this bunch?

Q. Yes.

A. I believe that was the only December check, yes.

Q. And all the rest on the Rialto Theatre bank account are dated February and March, 1940, is that right?

A. Yes, prior to March 23rd. March 6th and February [fol. 2713] 29th, and so forth.

Q. Now, with reference to that Rialto Theatre in Albion, New York, was that a theatre that you originally had under lease from Wilfred H. Robson?

A. Yes.

Q. When those checks were issued in December, February and March, you did not have any interest in that Rialto Theatre, did you?

A. Not as of January 1st, no. My wife was the owner.

Q. In other words, you transferred that theatre to your wife on September 1, 1939; did you not?

A. Yes, sir, that is when the agreements were made.

Q. When which agreements were made?

A. Of the transfer, but for income tax purposes, and so forth, we made it so that she would take over on the first of the year, because that is the fiscal year.

Q. You also transferred to her all the equipment in the house at the time, did you not?

A. The equipment don't belong to us. It belongs to Mr. Robson automatically.

Q. Didn't the instrument that you gave your wife also assign all your rights to the fixtures on the property?

A. Yes, but Robson's lease automatically, when you install a chair——

Q. No, I am asking you whether or not you did not trans- [fol. 2714] fer your rights in the fixtures to your wife at the same time, under the same instrument?

A. Naturally.

Q. Yet Robson owned it, you say?

A. Yes.

Q. At the same time didn't you transfer that bank account of the Rialto Theatre in the Marine Midland Trust Company to your wife?

A. No, I did not get around to it.

Q. One moment. Let me ask you this: Isn't it so that on June 19, 1939, you opened that checking account in the Marine Midland Bank in Albion, New York?

A. When?

Q. June 19, 1939.

A. Yes, we were dealing in Holley for awhile.

Q. You did open that account then, did you not?

A. Yes.

Q. Wasn't that account titled "Rialto Theatre," Mr. C. V. Martina, Sarah C. Martina, Power of Attorney"?

A. Well, I imagine that was right.

Q. Who is Sarah Martina?

A. My wife.

Q. Now, isn't it so that thereafter that account was changed, so that the account was "Rialto Theatre, by Sarah C. Martina, Charles V. Martina, Power of Attorney"? [fol. 2715] A. It should have been changed January 1, 1940, with the rest of the other things, but I was so busy with Syracuse and other matters that we just did not bother to go to the bank and transfer the account.

Q. In other words, that was your wife's bank account after January 1, 1940, was it not?

A. Well, technically it was.

Q. I want to know, was it actually her bank account, not technically.

A. It was technically and actually, both.

Q. When you signed those checks you were merely signing them as power of attorney, were you not?

A. Yes, but nothing stopped me from borrowing the money from my wife.

Q. I am merely asking you, were you signing as power of attorney?

A. I suppose, if that is what the bank records show, you are right.

[fol. 2716] Q. Well, as a matter of fact, during the summer and fall of 1939 and part of the spring of 1940, weren't you transferring your property generally to your wife? Weren't you?

A. That is when, it was 1940?

Q. I say, weren't you transferring your property generally, other property in addition to this Rialto Theatre at Albion to your wife?

A. No, the real estate always belonged to my wife.

Q. Which real estate?

A. The homes and things like that.

Q. Regardless of what belonged to your wife or belonged to you, weren't you generally transferring your property to your wife?

Mr. Kallis: If the Court please, I object to this.

The Court: He may state.

Q. What other property did you transfer to your wife in the fall of 1939 and the winter of 1939?

Mr. Kallis: I object to this.

The Court: Overruled.

The Witness: I can't remember.

Q. You don't remember?

A. No.

Q. Do you remember that you transferred the Mount Morris property in Livingston County to your wife?

[fol. 2717] A. Listen, is this a Bankruptcy Court?

Q. You just listen and answer the questions as his Honor has directed you.

The Court: Just answer the question.

The Witness: What did you say again?

Mr. Rogers: The reporter will give it to you.

(Last question read.)

The Witness: Yes, that was all done as of January 1st.

Mr. Wright: Just a minute, if the Court please, it isn't

clear to me what issue we are trying here that is involved in this case.

The Court: I think it is competent as bearing on the question of the purchase of this theatre and his right to it and how the debts were paid.

Mr. Wright: How is it significant, whether the ability was in his wife or in him.

The Court: Apparently the property,—he had a responsibility to purchase and pay these expenses and pay for the Empire Theatre.

Mr. Wright: There isn't any question about the fact that he didn't have enough money to keep the theatre going after he got in there, and the question is whether he had enough to get in there.

[fol. 2718] The Court: Objection overruled. Did you transfer the Mount Morris property to your wife?

The Witness: Yes, sir.

The Court: As of January 1st?

The Witness: 1940.

By Mr. Rogers:

Q. Now, didn't you on September 1st, 1939 transfer to your wife all your interest in the Family Theatre and the Genesee Theatre?

A. The Genesee Theatre isn't ours, but it is all right.

Q. Didn't you transfer it, I am asking you?

Mr. Kallis: If the Court please, I think he ought to ask him whether he had an interest in it.

Mr. Rogers: I don't care whether he had an interest or a lot.

The Court: If he didn't have, he can say. He wouldn't have transferred it if he didn't have it, in other words.

Mr. Rogers: Exactly, sir.

The Court: Did you transfer your interest in those theatres to your wife?

The Witness: Yes, it all took place September 1st, 1939, but the agreement didn't go into effect until January 1st, 1940.

By Mr. Rogers:

[fol. 2719] Q. That was also transferred in September with the understanding it would go into effect January 1st, 1940 for tax purposes, is that right?

A. On account of the income tax, we have always paid it, the fiscal year would end December 31st.

Q. And the calendar year would end December 31st, wouldn't it?

A. And so did our income tax year.

Q. By the time January first arrived you were practically insolvent, weren't you?

A. Well, I paid $21,000 before the opening.

Q. I am just asking you, weren't you insolvent on January 1st, 1940? Didn't your debts exceed your assets?

A. Well, that is why I am in bankruptcy, of course.

Q. Isn't that so?

The Court: As of that time, January 1st, 1940, were you insolvent?

The Witness: I don't see why I was insolvent. I paid $5,000 on the opening day of the theatre besides this $21,000.

The Court: The question is whether you paid your own funds or not.

Mr. Rogers: May I get an answer to that question or not?

The Court: He has answered the question.

[fol. 2720] By Mr. Rogers:

Q. Isn't it so that on January 1st, 1940, you were insolvent?

A. No, if I was insolvent I don't think I would——

Q. You say "No"?

A. No.

Q. Is it so that you were insolvent on February 1st, 1940?

The Court: I think that is going too far.

Mr. Rogers: No, your Honor, he made his lease, this lease in January, and he took possession of these premises in March. Now, surely if he was insolvent he knew insolvency was pending.

The Court: Supposing we assume he was insolvent at that time.

Mr. Rogers: Then the answer to that, your Honor, would be if he took this theatre, knowing he was insolvent, he wasn't speculating his own money, he was speculating as to how badly the creditors would be done in.

The Court: He wasn't speculating by no means. If I take a lease I expect to derive a profit from it.

Mr. Rogers: Then it is just as I stated, if this man takes a lease and runs into large expenses for alterations, there

[fol. 2721] is only one group to be hurt, and that is the creditors and not him if he is insolvent.

The Court: The only question is about those checks and the testimony is now these were paid out of funds in the name of his wife over which he had a power of attorney. That is the answer to that.

Mr. Rogers: Yes, but it was my understanding that your Honor ruled, as in my opinion rightly, that I had a right to inquire as to his financial condition at the time he made this and was undertaking this larger responsibility, as to whether or not he had any financial responsibility at that time. That is what we contend, that this was not a bona fide transaction at this time at all. Here was a man transferring his property to his wife, during this very period, making himself judgment proof, and becomes insolvent here, what would he have to lose here?

Mr. Kallis: There isn't any proof of that, and he had plenty to lose. Here are these checks he took out of his funds or his wife's funds, or his banker's funds. He didn't get it for nothing.

[fol. 2722] Mr. Rogers: On Mr. Kallis' statement, this man was paying debts with obligations he incurred, swapping one obligation for another.

The Court: I don't think we need to go further into it.

Mr. Rogers: I think your Honor has the situation. That is all.

Mr. Kallis: That is all.

The Court: Next witness.

Stanley G. Falk, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. Falk?

A. 61 Chatham Avenue, Buffalo, New York.

Q. What is your occupation?

A. I am an attorney.

Q. You also hold an office in the Syracuse-Strand Corporation?

A. Yes, sir.

The Court: What?

Q. You also hold an office in the Syracuse-Strand Corpora-

[fol. 2723] A. Syracuse-Strand Theatre Corporation.

Q. What is the full name of it?

A. Syracuse-Strand Theatre Corporation.

Q. What is the position you hold with that corporation?

A. I am President of that corporation.

Q. How long have you been President?

A. I can't tell you exactly, some time in the early 30s I was elected President.

Q. More than 10 years ago?

A. I think so.

Q. What is the business of that corporation?

A. Well, it was formed as an operating company and became more or less of a holding company.

Q. What does it hold?

A. It holds a ground lease on the premises known as the Syracuse-Strand Theatre, Syracuse, New York.

Q. And is the owner of the theatre building?

A. Yes, sir.

Q. Did you bring with you the lease you made of those premises to the S.K.E Operating Company in 1939?

A. I have a copy of it.

Q. This lease is the document you have just handed me, or the copy referred to?

A. Yes, sir.

Mr. Wright: I will ask to have that marked.

[fol. 2724] The Court: Is the inquiry as to the lease of the ground, the ground lease, you mean?

The Witness: No, this is not the ground lease, the lease with the S.K.E. Operating Company from the Syracuse-Strand Theatre Corporation.

The Court: I didn't understand you. You said you had the ground lease.

Mr. Wright: The Strand Theatre has a ground lease.

By the Court:

Q. The corporation has a ground lease?

A. Yes, sir.

Q. You also own the building?

A. We built the building on the ground.

Q. This is a lease to the operating company?

A. This is a lease from the Syracuse-Strand Theatre Corporation to the S.K.E. Operating Company, Ltd.

(Thereupon lease from the Syracuse-Strand Theatre Corporation to the S.K.E. Operating Company, Ltd., referred to was marked as Plaintiff's Exhibit No. 811 for identification.)

By Mr. Wright:

Q. Prior to the time you made this lease which has been marked for identification as Plaintiff's Exhibit No. 811, whom did you lease the Strand Theatre to?

A. Warner Brothers.

[fol. 2725] Q. And——

The Court: What is the date of that lease?

Q. The date, what date is it?

A. The 24th day of August 1939.

Q. Do you know approximately how long before that lease was made Warner was the tenant?

A. The lease with Warner was made in 1929.

Q. That is for 10 years, is that right?

A. Ten years.

Q. And then was the theatre operated by Warner when you first became President of the Strand Company?

A. I am not—I don't know whether it was operated by Warner or R.K.O.

Q. Either one or the other?

A. Yes, sir.

Q. Then do you recall when the Schine interests took over the operation?

Mr. McClennen: Just a moment. It hasn't appeared from this witness that they took over the operation.

Mr. Wright: I think it appears in the answer to the interrogatories. I will show the date. I don't think there is any doubt about it.

The Court: Is there a question about a lease to Schine?

Mr. Wright: The time when they took it over——

[fol. 2726] Mr. McClennen: It appears, I think, that a minority interest was acquired by Schine and that—I don't know whether it appears just what the operation was at that time and——

The Court: You refer to the operation, Mr. Wright?

Mr. Wright: Yes, have you got the date of the acquisition of interest?

Mr. McClennen: I have August, 1935, as the date when the Schine interests acquired a 30 per cent interest.

By Mr. Wright:

Q. Does that refresh your recollection as to when the Schines took over the operation?

A. All I could say on that score is that some time, several years prior to 1939, it was our understanding that Schine was operating the theatre. I don't know the date.

Q. Then during the last few years there, do you know how the theatre was being operated with reference to the time it was kept open or time it was kept closed?

A. Well, it was open part of the time and kept closed part of the time; closed part of the time during the summer, and, as I recall, it was closed and was not run continuously during the winter.

Q. Now, when you negotiated the lease here that is marked for identification as Exhibit No. 811, whom did you [fol. 2727] carry on negotiations with?

A. Mr. Schine.

Q. Which Mr. Schine?

A. Myer, as I recall it, and a representative of R.K.O. is my recollection, it was Mr. Meyers; but I am not positive of that.

Mr. McClennenn: Of R.K.O.?

The Witness: Yes, sir.

Mr. Wright: I am going to offer in evidence this Exhibit 811. Is there any objection?

(Thereupon lease previously marked as Plaintiff's Exhibit No. 811 for identification was received in evidence.)

The Court: Is there any question raised that Schine has not operated the theatre since 1935?

Mr. McClennen: It should be called to your attention that there is no specification in the bill of particulars or in the complaint or in any form that presents this as an issue. There is no objection made to the authenticity of this document. We merely made the objection that it is not material to this case.

The Court: My point was to avoid an extension of the [fol. 2728] record, that is all. The point of inquiry, I suppose, is the operation of the theatre by Schine, whether he operated it, and what period of time.

Mr. McClennen: There is no question that in this period the buying of product was conducted by R.K.O. and the operating of the theatre was conducted under the Schine administration.

The Court: Up to what time was the buying done by R.K.O., up to 1942?

Mr. McClennen: It was operated—the buying was done by R.K.O.—the property—the interest ended August 31, 1941.

The Court: The R.K.O. interest, you mean?

Mr. McClennen: The Schine interest.

The Court: Does that satisfy your purpose, Mr. Wright?

Mr. Wright: Well, that is all the preliminary data I wanted to establish here, yes.

Mr. McClennen: I ought also to say that R.K.O. participated in the physical operation as well, during the period of the operation.

The Court: Well, they did the buying.

Mr. Wright: As I understand it, it was a pooled operation by the parties.

The Court: What does that purport to be, Exhibit 811? [fol. 2729] Mr. Wright: That is a lease dated August 24th, 1939, between the Syracuse-Strand Theatre Company, Inc., of which the witness is President and S.K.E. Operating Company, Ltd., a New York corporation, which I believe, according to these interrogatories is the corporation through which Schine and R.K.O. held their interest in the property.

Mr. McClennen: Do I understand your Honor was going to admit the lease?

The Court: What I was trying to do, I thought perhaps some of these things there might be no disagreement about and there might be no object in cluttering up the record.

Mr. McClennen: Apparently there is no disagreement. I haven't heard any.

The Court: There might be some question about what was done under the lease, whether R.K.O. did purchase, and there is your statement that R.K.O. also participated in the operation.

Mr. McClennen: I recall to your Honor's attention the fact there is no specification in any way with respect to this lease or this Strand Theatre.

The Court: Well, I think we better admit it.

[fol. 2730] By Mr. Wright:

Q. I call your attention to this Article IV, of the lease marked as Plaintiff's Exhibit No. 811, the provision which reads as follows: "The lessee covenants and agrees to keep the theatre open for business and in operation at all times during the term of this lease, except that the theatre may be kept closed from May 15th to Labor Day in each year and the theatre may be kept closed for not more than four days of each week during all or any part of the remainder of each year, except that the theatre may be kept closed during an emergency, or pursuant to any law or regulation of governmental authority or any period required to make necessary repairs".

Can you tell us what, if any, discussion you had with Mr. Schine at the time you were negotiating the lease with reference to the operation of the theatre?

Mr. McClennen: This is objected to as not within any specification in the case.

The Court: You mean operation as to time?

Mr. Wright: Yes.

The Court: Objection sustained.

Mr. Wright: No, I am not talking about—when I said "operation" I was referring to what, if any, discussion [fol. 2731] there had been as to when the theatre would be operated and when it shouldn't.

The Court: That is shown in the lease.

Mr. Wright: It does say so in the lease. All I am asking for now is the negotiations that led up to that.

The Court: I do not think you can contradict an instrument in writing.

Mr. Wright: I am not attempting to contradict it. All I want to show is what the negotiations were which resulted in that being in the lease.

The Court: Of course, if your question is directed to who was to physically operate it, that is one thing, but I don't think you can show that other terms were made as to the time when it should be closed.

Mr. Wright: I will reframe the question.

Q. Was the theatre open at the time you made this lease here, dated August 24th, 1939?

A. I don't believe so, I don't think it was at the moment.

Q. And had it been closed during the preceding winter?

Mr. McClennen: This is objected to as not bearing on this case.

The Court: He may answer. Was it closed?

[fol. 2732] The Witness: Well, it had been operating. It may have been closed a short period of time.

Q. you don't know how low the periods were?

A. Well, it was closed, as I recall at that time, they would run it for a week or part of a week and close it for a few days and open it again and carried that program on.

Q. The rental that is specified in this lease, Exhibit No. 811, was that more or less than you had been receiving under the prior lease?

Mr. McClennen: That is objected to, if your Honor please.

The Court: Sustained.

Q. Were you able to find the prior lease or a copy of it?

A. No, I have not been able to find it in my files.

Mr. Wright: We can, of course, subpoena and produce the other lease.

The Court: What relevancy has it?

Mr. Wright: We simply want to show that the rental value of the Strand was gradually depreciated by these people as a result of their control of the product. It originally was rented at a figure substantially in excess of this renewal here, and when this expired substantially less than [fol. 2733] that was offered, and then the theatre was turned loose, and we propose to show what happened to it during that period.

Mr. McClennen: The amount paid under an earlier lease would have no tendency to show any of the things stated in Mr. Wright's offer. It would only show the amount of the rent and that would be shown by the lease, and would be immaterial in this case, if it were shown.

The Court: It is sustained at this time. The present amount of the lease may depend on different circumstances, the circumstances under which it was operated and conditions of operation.

Mr. Wright: Our contention is the principal circumstance which enabled these people to successfully reduce the rental is simply the control of pictures for the theatres, and I think it is relevant to show the effects of that control on theatre real estate.

Mr. McClennen: That would not be shown by the amount of the——

The Court: Well, we haven't the lease here, anyway.

Mr. McClennen: We haven't the lease here, and it was not a lease to us, so there would be no occasion for us to [fol. 2734] have it.

The Court: In the first place, you would have to have the lease, and show whether conditions modified the rental valuation and depreciated values.

By Mr. Wright:

Q. How long was the theatre operated under this lease, Exhibit No. 811? How long was it kept open?

Mr. McClennen: We make the same formal objection, if your Honor please. It has no bearing in this case, no specification——

The Court: Wasn't this answered?

Mr. Wright: No, he answered with respect to the prior period. I am now asking him with respect to the period commencing with this lease, Exhibit No. 811, how long it was open.

The Witness: It was operated for two years; just what part of the two years it was open, I wouldn't say.

Q. Would you say for the entire two years?

A. It was closed part of the summer. Whether it was closed for both summers, I wouldn't say.

Q. Do you recall the last time it was closed?

A. It was closed the summer of 1941.

Q. That was the summer before it expired, and about [fol. 2735] how long had it been closed before the expiration date of August 31, 1941?

A. I am not prepared to say the exact closing date. It was closed at the end of the spring, but I don't know.

Q. Some time in June or July?

A. Yes, perhaps in May.

Q. Then, after it was closed, did you carry on negotiations for a renewal of the lease?

A. Yes, sir.

Q. With whom?

A. With Mr. Schine and R.K.O.

Q. Do you recall who represented R.K.O.?

A. I don't believe that—I had a conference with Mr. Schine. I don't recall that any representative of R.K.O. was present, to my recollection. There maybe have been some one present. I subsequently talked to Mr. Kingsberg or Kingsbury.

Q. Malcolm Kingsbury?

A. Yes, in New York, myself, and he said he would look into the matter. I also had our representative take it up, one of our other officers took it up with some of the officers or managers of R.K.O. They told us to continue our negotiations with Mr. Schine.

[fol. 2736] Q. Well, now, where did you have your negotiations with Mr. Schine?

A. In Syracuse.

Q. What time was this, do you recall?

A. I believe it was the end—during the month of August, or it may have been in July, but I think it was in August.

Q. A month or two before the expiration of the lease?

A. Quite near the expiration of the lease.

Q. Where in Syracuse were these conversations held?

A. I am quite sure in the Hotel Onondaga.

Q. Was there any one else present besides you and Mr. Myer Schine?

A. I am quite sure that Mr. Clinton Carr of our company was there, and I believe Mr. Charles Carr. Whether Mr. John May was there I am not sure. Sometimes Mr. May was and sometimes he was not. I don't recall whether he was there at that time or not.

Q. What was said at those conversations?

Mr. McClennen: That is objected to, if your Honor please. Here is a case of great detail. Specifications were ordered so that we might know what we were expected to meet. There is no specification that brings this in. I submit that we ought not to be called upon to go into it. Otherwise, all the attempts of the Court to have us apprised of [fol. 2737] what we were to try are futile. That is the reason for specifications, and I urge that this conversation should not be received, because it has no bearing upon the issues made in this case.

Mr. Wright: If the Court please, the reason for the absence of specifications in the original pleadings is that this

matter, of course, did not arise until after the suit was filed. Counsel, however, were notified, I believe, by letter that we were going into the Syracuse situation. They were also notified that this gentleman would appear as a witness. I don't think there is any surprise involved in what we are doing now.

Mr. McClennen: I assume that the letter referred to is the one that I have seen that informed us that Mr. Falk was to be a witness, but no suggestion in the letter in any respect whatever of this matter that we are now discussing.

Mr. Wright: I do not understand at any time we are bound to supply these people with a statement of what a [fol. 2738] witness s testimony will be, before we put him on the stand.

Mr. McClennen: No, but when you state what is in the contents of a letter addressed to us you are bound to state it accurately, so that we do not have to call attention to the fact that it was not in that letter.

Mr. Wright: I will be glad to show the Court the letter.

Mr. McClennen: What?

Mr. Wright: I will be glad to have you show the Court the letter.

Mr. McClennen: I dare say you would, but you would not be glad to concede, without showing the Court the letter, the fact that it did not state this transaction.

Mr. Wright: What it stated I don't recall at the moment, and I would be very glad to show the Court the letter.

The Court: You said something about going into the Syracuse situation?

Mr. Wright: As I understand it, at least some letter has been written to that effect. If you have not received such a letter, I have no objection to your showing the Court whatever you did receive. Will you get our copies of the letters [fol. 2739] that have to do with Syracuse? (Addressing Mr. Kallis.)

The Court: I will permit the inquiry. Proceed, Mr. Wright. I think the Court has discretion. Proceed.

Mr. Wright: Counsel was apparently referring to a letter handed him recently. I was under the impression we had written a letter, last summer dealing with Syracuse, to Counsel, during the summer adjournment.

Mr. McClennen: I have no knowledge of any such letter.

The Court: Irrespective of that, I will let him answer.

it may be subject to a motion to strike. What took place on that occasion in Syracuse; what was said?

The Witness: I discussed with Mr. Schine the question of whether they would continue to lease the Syracuse Strand Theatre. We had considerable discussion on the subject, and finally Mr. Schine made an offer of eighteen thousand, plus, as I recall it, a percentage of the profits. I told him that that was out of the question. I told him I did not think he was being fair. I told him that he had the situation in Syracuse well in hand, if this lease was not made we would [fol. 2740] go into competition with him, that the theatre was not going to be kept closed, and that I felt he should make a reasonable and fair offer for the theatre. He insisted that the theatre was not worth more than what he was offering, in fact it was not worth that much, and I urged him to reconsider the matter, and it is my recollection that he told me that his associates would not pay more than that. I urged him to take it up with them and advise me promptly whether they would not pay a more reasonable rent, and that ended the conference.

The Court: Reasonable rent?

The Witness: Rent.

The Court: Rental and percentage, you mean?

The Witness: I was not interested in the percentage. I asked for a rental.

The Court: You say $18,000?

The Witness: And a percentage; but I asked for more reasonable rent, that is, higher rent.

The Court: That is what I was getting at, as distinguished from purchase.

[fol. 2741] The Witness: Oh, yes, there was no discussion of purchase, as I recall.

By Mr. Wright:

Q. Percentage was a percentage of gross or net profits?

A. Net.

Mr. McClennen: That is objected to.

The Court: Overruled.

Q. Was anything said in the course of this conversation with reference to the effect of the lease of that theatre on the Syracuse situation?

Mr. McClennen: Same objection.

The Court: Let him state the whole conversation.

Q. State it all, as nearly as you can recall it.

A. I called to Mr. Schine's attention the fact that while he had the Syracuse Strand Theatre, and except for Loew's, he had—he and RKO had control of all the important theatres in down-town Syracuse, and that if he did not renew this lease there was going to be an attempt, at least, for major competition, that we were going into competition, that we were not going to let this theatre stay closed. We would either rent it to someone else or endeavor to operate it.

Q. What did he say about that?

A. He simply said it was not worth more than he was offering.

[fol. 2742] Q. How did that offer of $18,000 compare with what it actually cost to maintain the theatre?

Mr. McClennen: That is objected to, if your Honor please, not only on the general ground, but calling upon the witness to make a comparison of figures not in evidence in any way.

The Court: This question is directed to the cost of the operation of the theatre at that time.

Mr. McClennen: And this witness was not operating the theatre at the time.

Mr. Wright: I think perhaps I can clarify that, if I rephrase it.

By Mr. Wright:

Q. What was the cost to your corporation, the annual cost to your corporation, of maintaining the theatre? That is, with reference to ground rent, maintenance, insurance, taxes, et cetera?

Mr. McClennen: That is objected to, if your Honor please.

The Court: Overruled.

A. In the neighborhood of $22,000.

Q. When was it that Mr. Schine gave you a final "No" on the renewal?

A. Some time during August of that year, 1941, August, 1941.

Q. Then what, if anything, did you do with reference to leasing the theatre to any one else?

[fol. 2743] Mr. McClennen: That is objected to, if your Honor please.

The Court: Overruled.

A. We got in touch with all the major operating companies. We got in touch with a couple of agents. We got in touch with some people we knew were interested in the theatrical field, and endeavored to rent the theatre to someone else.

Q. Did you receive any offers?

Mr. McClennen: That is objected to, if your Honor please.

The Court: Overruled.

A. Eventually we received an offer from Mr. Wallace, among others.

Q. That was when?

A. That, as I recall, was in September of that year.

Q. Did you receive at any time any offer to lease the theatre from Loew's?

A. Well, subsequently, much later, but not at that time.

Q. Not until after 1941?

A. Oh, no, not until 1943, as I recall it.

Q. At this time did you receive any offer from Warner?

A. No.

Q. Did you receive any offer from Paramount?

A. No.

Q. Did you receive any offer from 20th Century-Fox Film Corporation, or any of its theatre-operating subsidiaries?

[fol. 2744] A. No.

Q. That period would include the entire year 1941?

A. Yes, we started in the summer of 1941, or the spring of 1941, to endeavor to get a tenant.

The Court: What?

The Witness: We started in the spring of 1941 to endeavor to find a tenant. I wrote to Mr. Schine, I believe, early in the spring of 1941, and I don't think we got together until the middle of the summer, but we started the same time to look around for a tenant.

Q. During the years 1941 and 1942 you received no offers to lease from any of those companies?

A. No, none.

The Court: You said it cost about $22,000 to operate?

The Witness: Carrying charges.

The Court: Yes, carrying charges. Part of that $22,000 was paid to your holding company?

The Witness: No, no. An Estate, known as the Anderson Estate, owns the fee of the property. We paid them a ground rent of $12,000 a year. My recollection is that the taxes were running around $10,000 that year, and we had insurance and minor repairs, and my recollection is that [fol. 2745] it was around $22,000. Those figures would make it a little more, but it was approximately in the neighborhood of $21,000 to $24,000.

The Court: All right.

By Mr. Wright:

Q. You say you made a lease with Mr. Wallace?

A. Yes.

Q. Have you got a copy of that lease with you?

A. I don't know. I don't think so.

The Court: Mr. Wallace, have you got a copy of it there?

(Document is produced.)

Mr. Wright: Mark this for identification as Plaintiff's Exhibit 812.

(Lease to Mr. Wallace referred to marked as Plaintiff's Exhibit 812 for identification.)

Q. Do you recognize this document marked for identification as Plaintiff's Exhibit 812 as a copy of the lease you made with Mr. Wallace?

A. Yes.

Q. Reference appears here to the Syracuse Community Theatre Corporation. Can you tell us what that corporation was and how it was organized, who was interested in it?

A. That was a corporation formed, or caused to be formed, by Mr. Wallace, and the Syracuse Strand Theatre [fol. 2746] Corporation in which each of those two interests had a half interest.

Q. Your corporation and Mr. Wallace each held half?

A. That is right.

Q. Then that Syracuse Community Corporation operated the Strand under that lease for about how long?

A. About four months or five months.

Q. Four or five months?

A. Yes.

Q. Were losses sustained by the Syracuse Community Corporation during that period?

Mr. McClennen: That is objected to, if your Honor please.

The Court: Of course, the loss may be attributed to many circumstances.

Mr. Wright: That is quite right. We expect to show by further testimony, of course, that it was attributable to the inability of the theatre to get product.

The Court: I will let him answer. Overruled.

A. Yes.

By Mr. Wright:

Q. Those losses were shared equally, were they, by your corporation and Mr. Wallace?

Mr. McClennen: That is objected to, if your Honor please.

The Court: I don't think that is material.

[fol. 2747] Q. Do you know about how much they were?

Mr. McClennen: That is objected to.

The Court: Objection sustained. What is the last question?

Mr. Wright: I asked him how much the loss was.

The Court: Overruled.

Q. Approximately.

The Court: In four months, you mean?

Mr. Wright: Yes.

A. I think the corporation, that is, the Syracuse Community Theatre Corporation, lost between fifteen and twenty thousand dollars, maybe more.

Q. During the period of its operation?

A. Perhaps a little more, yes.

Q. Then when they ceased operating what, if anything, did you do with theatre?

A. Syracuse Strand Theatre started operating.

Q. You started to operate it yourself?

A. Yes.

Q. How long did you operate it?

The Court: Whom did you say?

The Witness: Syracuse Strand Theatre. I think we operated it for three or four months, maybe longer. I am not sure.

Q. That would be in the spring or the winter of 1942?

A. No, that was in the spring of 1942.

[fol. 2748] Q. Then you ceased operating the theatre?

A. Yes.

Q. Closed it?

A. Yes.

Q. During the period of your operation do you know what kind of a policy it operated on?

Mr. McClennen: That is objected to again, your Honor, on the ground it is one of the things that should have been specified.

The Court: Overruled.

A. Why, we ran stage shows and pictures. I think perhaps a little—I don't know—I was going to say perhaps some Bingo, but I am not sure that we had any Bingo at that time.

Q. What kind of pictures?

Mr. McClennen: May it be understood the objection goes to all of this?

The Court: Yes. It refers to what kind of a run?

The Witness: Well, I don't know the technical language of the moving picture industry well enough. We had some——

Mr. McClennen: Could I interpose this further objection? I suppose these things were under some form of contract.

The Court: I will let him state the type of pictures they [fol. 2749] played, irrespective of what the contract was for. It is a question of what they did.

Mr. McClennen: I was led to make the objection because the witness, with lawyer-like accuracy was confessing lack of his familiarity with these terms, and the contracts would tell what they got precisely, and I make that further objection, therefore, that it should be shown by the contracts that were made, if at all.

The Court: I will let him state what they did run.

The Witness: We got some product from the independent companies, such as Republic and Monogram. We had some

old pictures, and we may have had some so-called Class B or poorer grade pictures that major companies produced, and we had some—I think I said subsequent run pictures.

Q. Did you make or lost money during that period?

Mr. McClennen: Same objection.
The Court: Overruled.

A. We lost a considerable sum of money.

Q. Did you have anything to do with negotiating or attempting to negotiate for product for the theatre during that period?

[fol. 2750] A. I talked to representatives of——

Mr. McClennen: Please don't state until I——
The Court: The question is yes or no.
The Witness: Oh, yes.

Q. What were they, with whom and where?

Mr. McClennen: That we object to.
The Court: Overruled.

A. I talked to Mr. Ralph Maw of Metro-Goldwyn-Mayer.

Q. When was that?

A. Well, it was some time during the year of 1942, or perhaps in the fall of 1941. I cannot place the date. I haven't a record of it.

Q. It was while the theatre was in operation?

A. That is right. I talked to Mr. Maw, and I have known him for a long time. I told him I wish he would try and get us some decent product. He said he would do the best he could. I also talked to Mr. Sidney Samson——

Q. Just a moment. Did you hear anything further from him?

A. Well, we got some product, not very good, but some.

Q. From Metro?

A. From Metro.

Q. Whom else did you talk to?

A. I talked to Sidney Samson of 20th Century-Fox. I met him over at the Athletic Club one day. I had known him for a great many years.

[fol. 2751] Q. When was this?

A. This was during that same period. I can't tell you exactly.

Q. What did he tell you?

A. I told him we were running in Syracuse, having trouble getting product. I wished—that he ought to give us some. He said he did not have any available. "You haven't any available of any kind?" He said, "No, none of any kind." I said, "God, Sid, I can't understand that."

Q. Anything else?

A. That was that. Yes, I asked him what was the matter with the situation in Syracuse. He said we were foolish to run. That about ended that conversation.

Q. Did he tell you why you were foolish to run?

A. Well, he said we could not operate it successfully.

Q. Did he say why?

A. No.

Mr. Wright: That is all.

Mr. McClennen: Now that these conversations are ended with Mr. Maw and Mr. Samson, we move as to each that they be stricken out.

The Court: I will let them stand.

Mr. Rogers: No cross-examination.

Mr. Wright: If the Court please, for the record I would [fol. 2752] like to state at this time what the situation is as to this correspondence, as we understand it, and the pleadings at Syracuse. I find Syracuse is mentioned in the supplemental bill of particulars that was furnished, as a situation where the defendant had a local monopoly, and I believe that charge occurs in paragraph 18, listing the towns in which they are alleged to have monopolized product.

On August 19, 1944, a letter was written to Willard McKay, over Mr. Berge's signature, which states as follows:

"Several responses to interogatories and requests for bills of particulars filed by the plaintiff in the above case have included specifications with reference to Rochester and Syracuse, New York. The following information as to plaintiff's proof is furnished to you with respect to the Rochester and Syracuse situations, supplementing information already supplied.

"1. With respect to Rochester, the plaintiff will undertake [fol. 2753] to show", and it cites A, B and C.

Item 2 is with respect to Syracuse: "A. That the exhibitor defendants, in conjunction with their theatre-operating partner in Syracuse, have demanded and received from all distributors preference and priority over the Strand The-

atre during the period of its operation by Charles V. Martina and subsqent operation by Hubert P. Wallace and associates."

Then a subsequent letter was written on September 20th to Mr. McKay, which states: "Reference is made to the letter from this office, dated August 19, 1944, in which you were advised that the plaintiff's proof with respect to Rochester and Syracuse would embrace the matters indicated in paragraphs 1 and 2.

"It has been noted that paragraph 2, with respect to Syracuse, did not specify correctly the names of the theatres connected with the testimony of Charles V. Martina and Hubert P. Wallace. It is therefore desired to correct [fol. 2754] paragraph 2 to read as follows: A. That the exhibitor defendants, in connection with their theatre-operating partner in Syracuse, have demanded and received from all distributors preference and priority over the Empire Theatre during the period of its operation by Charles V. Martina, and over the Strand Theatre during the period of its operation by Hubert P. Wallace and associates."

The correction was, the first letter had erroneously referred to the Strand as Mr. Martina's operation.

The last letter I believe Counsel referred to in his statement to the Court is dated October 2nd, addressed to Mr. McKay, signed by Milton Kallis, "Supplementing our letter of September 16, 1944, with reference to the names of witnesses who may be called during the week of October 2, 1944, we hereby notify you that in addition to those specified we may call as witnesses, Paul Paulvin, George Smith, Stanley Falk."

The Court: I suppose there is no question raised regard-[fol. 2755] ing the receipt of these letters?

Mr. McClennen: I think not, your Honor. We called attention to the fact that they give us no information of any claim of any misconduct with respect to the operation by Mr. Falk at all.

The Court: He does specify the theatres.

Mr. McClennen: He specifies Mr. Wallace.

The Court: And the theatres?

Mr. McClennen: Mr. Wallace's operation of the Strand.

HUBERT P. WALLACE a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. Wallace?
A. Auburn, New York.
Q. What is your occupation?
A. Theatre business and real estate.
Q. What theatre do you operate there?
A. The Capitol Theatre.
Q. How long have you operated it?
A. Approximately fourteen years.
[fol. 2756] Q. The theatre is operated in the name of the corporation?
A. Yes, sir, the Auburn Capitol Theatre Corporation.
Q. You began the operation, you say, in 1930?
A. April 29, 1931.
Q. 1931?
A. Yes, sir.
Q. What were the other theatres in the town then?
A. The Jefferson Theatre, Palace Theatre, and the Strand Theatre.

The Court: Where do you mean?
Mr. Wright: At Auburn.
The Court: Where?
Mr. Wright: This is at Auburn, New York.
The Court: I thought you said Armour.
The Witness: No, at Auburn.
The Court: I misunderstood you. I tried to find out where Armour was. I heard that name some place.
Mr. Wright: Read that last.

(Last question and answer read.)

Q. Were these theatres then being operated?
A. Two of the theatres were.
Q. Which two?
A. The Jefferson and the Strand.
Q. And the third was closed?
A. It was running part-time, as I recollect.
[fol. 2757] Q. What was the name of that theatre?

A. Palace Theatre.

Q. Your theatre was the Capitol?

A. Capitol.

Q. Who was operating the other three theatres?

A. Fox people.

The Court: You mean three besides yours or four all together?

The Witness: There were four all together.

Q. How long did Fox operate the theatres?

A. To the best of my recollection it was until the latter part of 1932 or the early part of 1933.

Q. During that period what policy were you operating the Capitol on?

A. On a first-run policy.

The Court: 1933, you mean?

Mr. Wright: Yes, that is 1931 to 1933.

Q. With what major product, if any?

A. We had RKO-Pathe, United Artists and Columbia.

Q. Then what was the last season that you had the RKO first-run, regular first-run product?

A. The 1932-1933 season.

Q. I will hand you this document and ask you if that is the contract you refer to?

A. Yes, sir.

Mr. Wright: I will ask to have that marked the next [fol. 2758] Plaintiffs exhibit number for identification.

(Contract between Mr. Wallace and RKO 1932-1933 season referred to was marked as Plaintiff's Exhibit 813 for identification.)

The Court: You mean the last contract with RKO?

Mr. Wright: Yes, for regular season's first-run.

Q. Who took over the operation of the other theatres there after Fox stopped running them?

A. Schine-Shea interest, a pooling arrangement.

Q. During the 1933-1934 season what, if any, major product did you have first-run on?

A. I had—the principal product was Paramount.

Q. What were the others, if any, major first-run?

A. We had some United Artists first-run and we had, I believe, three RKO pictures first-run, and some few Columbia pictures.

Q. The Paramount—contract for the Paramount first-run you referred to, is this the document I hand you now?

A. Yes.

Mr. Wright: I would like to have that marked the next exhibit for identification.

(Contract between Mr. Wallace and Paramount referred to was marked as Plaintiff's Exhibit 814 for identification.)

[fol. 2759] Q. After the 1933-1934 season did you have any regular first-run contract with any of the major distributors?

A. I had United Artists, about 30 pictures.

Q. What season was that?

A. That was the 1934-1935 season, and I had about—oh, 14 to 16 pictures from RKO, and I had, roughly, a few pictures from Columbia.

[fol. 2760] Q. Were those R.K.O. pictures those you got under regular contract, or were they spot booked?

A. They were spot booked.

Mr. McClennen: I would be obliged if you would pause when I rise to object to the Court.

The Witness: I am sorry.

Mr. McClennen: The contracts would be the best way of showing this, I submit.

The Court: Sustained.

Mr. Wright: As I understand it, the term "spot booking" means licensing the picture without entering into a formal contract.

The Court: Well, then, it might depend on the form of the contract for the picture. I did not understand the meaning of "spot booking."

Q. Would you tell the Court what you mean by the term "spot booking" of a picture?

A. In the neology of the picture business "spot booking" means you can pick up a picture that has been rejected by somebody else without going through the formality of a contract.

The Court: The contract, I suppose, is a contract to buy——

The Witness: The contract is usually oral.

Q. Do you customarily sign an application like this for [fol. 2761] it?

A. Sometimes you do and sometimes not.

Q. Now, with reference to the season subsequent to 1934-35, what, if any, major first-run product has been regularly exhibited in your theatre under a season first-run contract?

A. Columbia pictures.

Q. Any others?

A. Well, we had a few rejected pictures from R.K.O. We had a few foreign and reissued pictures from the United Artists and I believe we had five or six rejected pictures from Warner First National.

Q. What do you mean when you say a rejected picture?

A. Pictures that had been generally released in the film area over a period of months and rejected by the opposition, that is, the Schine interests.

Mr. McClennen: I move to strike, if your Honor please.

The Court: By the exhibitors. Strike out the word "Schine"; by the exhibitors.

Mr. Wright: I will offer in evidence these last two contracts that were identified.

(Thereupon the contracts previously marked for identification as Plaintiff's Exhibit Nos. 813 and 814 were received in evidence.)

[fol. 2762] Q. I call your attention to Exhibit 813, and ask you what theatres are referred to by the statement that appears there, "The following 15 products were sold to Skouris Theatres for a first-run"?

A. Well, that would refer to the Jefferson Theatre, the Strand Theatre and possibly the Palace Theatre.

Q. Those were the theatres you previously referred to as having been operated by Fox when Mr. Skouris was associated with Fox?

A. Yes, sir.

Q. As I understand it from that contract, you had the R.K.O. first-run during the 1932-33 season, and it was played between you and the other three theatres there that Fox and Skouris was operating?

A. We did.

Q. As I understand it, the Fox referred to was "Fox Metropolitan Play Houses"?

A. I could not answer that. I think it was some Fox-Skouris connection, but I don't know the connection. We only referred to it as Fox.

Mr. McClennen: I call your attention to the fact that this was referred to in the question just now as the 1932-33 product which had been described before as being for the full line. It is in fact to Fox Metropolitan.

[fol. 2763] Mr. Wright: That is just what I got through calling the Court's attention to, that it was not for the full line.

Mr. McClennen: For eight pictures to the Fox Metropolitan, and one-half of the balance to Fox Metropolitan and one-half to the Auburn Capitol Theatre, there being at present in the record, therefore, no contract for any full line of product.

The Court: That is not claimed.

Mr. Wright: Obviously not.

Mr. McClennen: It had been stated earlier, and I am speaking of the correction.

By Mr. Wright:

Q. Then with reference to the R. K. O. product for the next season, 1933-34, were you solicited by any one from R. K. O. for a first-run of the product during that season?

A. No, sir.

Q. The season contract, and did you have any conversation with any one from R. K. O. about first-run pictures for the 1933-34 season?

A. I did.

Q. Whom did you talk to?

A. I believe it was Charles Boasberg.

[fol. 2764] Q. Who was he?

A. The salesman in the Buffalo territory.

Q. He was the salesman who covered Auburn?

A. Yes, sir.

Q. Where did you see him?

A. At the office of the Capitol Theatre in Auburn, New York.

Q. What was the conversation you had with him about it?

Mr. McClennen: The usual objection.

The Court: Overruled.

The Witness: I asked Mr. Boasberg for some product, and he told me that he had sold a contract for the full line of R. K. O. pictures to the Schine-Shea outfit, and, however, he would keep a close check on the situation, and if there were any rejected pictures during the season he would be glad to give them to me from time to time, as they became available.

Q. Was there anything said by him as to why they had sold to the Schine-Shea instead of offering the product to you?

A. Well, he said "Of course, you understand, we made a circuit deal and that was included in the circuit deal", and he could not help it.

[fol. 2765] Q. Did you discuss the matter with any one else at R. K. O.?

A. I believe I talked with—no, I referred the matter to my attorney in Syracuse.

Q. You had no further conversation?

A. No, sir.

Q. Then, calling your attention to this contract with Paramount for 1933-34 pictures, which has been marked Exhibit 814, were you offered the Paramount product first-run for the following season?

A. No, sir.

Q. Did you have any conversation with any one from Paramount about that?

A. I did.

Q. Whom did you talk to?

A. I talked with Mr. Caskey.

Q. Several times? Who was he?

A. He was the Syracuse salesman, and I talked with Mr. Robinson, the Buffalo Branch Manager.

Q. When did you talk to them?

A. Well, they used to stop in to the theatre. Caskey would, almost every week.

Q. When was the first time either of them told you you weren't going to get the 1934-35 product?

A. That was about the 10th of October, 1934.

Q. Who was that that told you, was that Caskey or Robin-

[fol. 2766] son, or both?

A. That was Mr. Caskey.

Q. Whereabouts?

At the office of the theatre in Auburn, New York.

Q. What was said then?

Mr. McClennen: Same objection.

The Court: Overruled.

The Witness: Mr. Caskey came into the theatre and he said "It is my unfortunate duty to come in and tell you that Paramount has sold away to Schine. Both Robinson and I objected very strenuously to this procedure, but there was nothing we could do about it."

Q. Then——

Mr. McClennen: I move that that answer be stricken, if your Honor please.

The Court: Overruled.

Q. Then did you see Robinson?

A. After that I saw Robinson about either a week or a few days later.

Q. Whereabouts?

A. In the office of Willis Sargent, in Syracuse, in the Willard Building.

Q. Who is Willis Sargent?

A. Willis Sargent is my attorney.

[fol. 2767] Q. What was the conversation then?

A. Mr. Caskey and——

Q. Mr. Caskey,—who was present?

A. Mr. Caskey was present, Mr. Robinson was present, Sargent and I.

Mr. McClennen: Same objection.

The Witness: I said to Caskey and to Robinson, "I think you are kidding about the selling away to Schine, because when you originally sold me the pictures, you said I would be your customer and would continue to be your customer," and Robinson went on to tell me he had discussed the matter at great length with Mr. Unger. He had made several trips to New York. He felt very much embarrassed, and, as he explained it to Sargeant, we were a good account, he had received more money than he expected to get; that he had explained these things to Unger, all to no avail. The point was he simply could not prevail against——

Q. Just state the conversation.

A. Mr. Robinson told Sargent and I there was nothing he could do to prevail against Mr. Unger making a certain deal. There was nothing he could do about it. Mr. Caskey [fol. 2768] said frankly "I feel like resigning from my position."

Q. Was that all the conversation then?

A. Mr. Sargent stated he was going to see Mr. Unger himself in New York.

Mr. McClennen: May that be stricken out?

The Court: Well, the statement of how Caskey felt, that may go out.

Mr. McClennen: That may go out?

The Court: Yes.

Mr. Wright: What is the part stricken out?

The Court: He said how he felt about it, how he and Caskey felt about it or how he personally felt about it.

Mr. Wright: I submit it is competent as showing what he said.

The Court: Strike it out.

Q. Then did you hear anything from Mr. Unger or any other representative of Paramount with respect to that matter?

A. I did not.

Q. Was the season first-run deal of Paramount Pictures ever offered to you after that?

A. No, sir.

The Court: We will have to suspend at this time, as I have an appointment.

(Whereupon a recess was taken until 2 P. M.)

[fol. 2769] After Recess, 2 o'clock P. M.

Appearances: As before noted.

(Reporter's note: Correction: Page 2553, line 1 change to read "I just own the building.")

HUBERT P. WALLACE resumed the stand by and on behalf of the Plaintiff, having been previously sworn, was examined and testified as follows:

Direct examination (continued).

By Mr. Wright:

Q. During the period from 1935 to 1938, did Schine operate the other three theatres in Auburn the full time?

A. They did.

Q. Then, in the year 1938 there was another theatre constructed there?

A. There was.

Q. What was the name of that theatre?

A. The Auburn Theatre.

Q. That was built by Schine?

A. Yes, sir.

Q. When did that open?

A. Approximately September 15th, 1938.

Q. Then, after the Auburn was built, did the Schines con-
[fol. 2770] tinue to operate all four theatres full time?

A. Yes, sir.

Q. During the period from 1935 prior to the opening of the Auburn, what, if any, efforts did you make to secure first-run major product for your theatre?

A. Well, I made continuous efforts with the various film companies.

Q. Did you ever discuss terms with any of them for a season deal?

A. We never approached that point where we discussed terms.

Q. Well, who did you have your talks with?

A. Well, I had a talk with Mr. Kemper.

Q. Who was he?

A. He was a salesman for Fox.

Q. Who were the others?

A. Mr. Caskey and Mr. Robinson.

Q. Just say who they were in each case.

A. The Branch Manager and Salesman for Paramount; Mr. Zurich, Salesman for Warner First National, and Mr. Boasberg, the Salesman for R. K. O., and I believe I talked with—I know I talked with the salesman for M. G. M., but I just can't recall his name.

Q. Did you talk to the M. G. M. Branch Manager at all?

A. No, I didn't.

Q. These conversations you have referred to were had [fol. 2771] when, with reference to the selling season each year?

A. Well, about the fall, at the beginning of the selling season, around August or September.

Q. Can you recall what, if any, reasons were given to you for not discussing the deal?

The Court: That is too general.

Q. Well, let us take it company by company; first as to the R. K. O.

Mr. McClennen: Who, of R. K. O.?

Mr. Wright: I think he testified he talked to Mr. Boasberg.

Q. Is that right?

A. Mr. Boasberg.

Mr. McClennen: He means Mr. Boasberg on this occasion?

The Witness: I talked with Mr. Boasberg and asked for first-run.

Mr. McClennen: The usual objection.

The Court: Proceed.

The Witness: I talked with Mr. Boasberg and asked for first-run pictures and he said he had sold the pictures, the complete product to the Schine-Shea people.

Q. Now, how often did you see him throughout this period 1935 to 1938?

A. Mr. Boasberg would call until he was made Branch [fol. 2772] Manager and then Divisional Manager, he would call probably once a week or once every two weeks.

Q. Throughout the year?

A. Throughout the year.

The Court: Why would he call if you were not getting the product?

The Witness: They were mostly social calls.

Q. There was none of these calls that any first-run terms were discussed?

A. Not on a season product.

Q. What was the product you had the discussion with him about?

A. Some rejected pictures occasionally.

Q. Then with reference to your conversations with the Fox representative, who was that?

A. Mr. Kemper.

Q. How often did you see him?

A. Oh, probably once a month or once in six weeks.

Q. Did you have any talk with him during this period about a first-run deal?

A. I did.

Q. About how often, do you remember?

A. Well, at least three or four times.

Q. And what did he say about it?

Mr. McClennen: Same objection.

[fol. 2773] The Court: Proceed.

The Witness: Mr. Kemper stated to me that both the Fox and the Schine people were customers of theirs and that he would not even attempt to discuss a first-run deal with me, but if an occasion ever came up to give me a rejected picture he would be very happy to call on me and sell it to me.

Q. Did he offer you any rejected pictures?

A. I believe he did offer me three at one time. Those pictures were offered to me, or, I should say, six months after they were released.

Q. Now, with reference to the representative of M.G.M., how often did you see him during that three-year period?

A. I believe I only saw him twice.

Q. What were those occasions?

A. One time the M.G.M. representative called with Boasberg and in the course of the conversation, in requesting pictures from Boasberg, I asked for any rejected pictures that M.G.M. might have.

Q. Were you offered any of those?

A. No.

Mr. McClennen: That is objected to. What was said?

The Court: Strike it out. Objection sustained.

The Witness: The M.G.M. representative said that to the [fol. 2774] best of his recollection they had had an account in Auburn for the past 15 years, and they were still serving

that same account today and there wasn't any likelihood or any prospect that there would be any pictures available from their office.

Q. Then did you have any conversation during this period about a first-run for your theatre with the Warner representative?

A. Yes, sir, I did.

Q. Who?

A. With the Syracuse salesman by the name of Jack Zurich.

Q. How often did you see him?

A. He used to call quite frequently, or every other week.

Q. What was the conversation you had with him when he called?

A. I asked Mr. Zurich——

Mr. McClennen: Same objection.

The Court: Same ruling.

The Witness: I said "Mr. Zurich, have you any pictures available first-run in Auburn?" He stated to me that at the present time there was an accumulation, and that at the present time—I mean the period 1936-1937, he said there was an accumulation of seven or eight pictures and he would [fol. 2775] take it up with the Branch Manager, whose name I believe was Harry Seed and——

Q. What do you mean by accumulated pictures?

A. Pictures that had not been played by the other theatres in the town, and had through a period of time, that is, over a period of four or five months, the inference I had drawn was that——

Q. Never mind about the inference you had drawn: confine yourself to what you knew about the theatres.

A. Pictures that had accumulated over four or five months.

Q. You mean that had been released?

A. That had been released but had not been played.

[fol. 2776] Q. Well, then, did you hear anything further from Warner with reference to these accumulated pictures?

A. I did.

Q. When was that?

A. Sometime in 1937.

Q. Whom did you talk to?

A. Mr. Zurich.

Q. What did he tell you then?

Mr. McClennen: Same objection.

A. He said he was successful in getting some pictures and we signed the contract, I believe, for seven pictures and played the pictures.

Q. Then did you have any conversation with him about a first-run season's products?

A. I did.

Q. When was that?

A. For the two years prior—each selling season I would ask them what the conditions were, whether there was any possibility of getting a first-run deal, and if I could put in an offer for first-run product on the season's deal. Zurich said that Schine was the customer and that there wasn't any likelihood that a season's deal would even seriously be considered.

Q. During this period from 1933 through 1938, prior to the opening—1935 through 1938, prior to the opening of [fol. 2777] the Auburn, did any of the Schine theatres play a regular second-run of major product?

A. No, sir.

Q. What, if any, efforts did you make to secure a second-run of the major pictures for your theatre?

A. Well, I——

Q. Take it company-by-company, if you will?

A. I wrote Sidney Kent of Fox, and wanted to know if there was any justification——

Mr. McClennen: Just a moment.

Q. Just——

A. I asked him for a second-run.

Q. When you say you asked him for a second-run, did you have a conversation with any representative of the exchange?

A. I had at that time.

Mr. McClennen: Just a minute. This appears to be a statement of what was in a letter, and I ask that it be stricken.

The Court: He stated he wrote to the Company and then partially stated what the contents were.

Mr. Wright: I take it that was stricken.

The Court: Strike it all out?

Mr. Wright: I think the fact that he wrote stays in.

The Court: The statement that he wrote, that may stand. The contents may be stricken out.

[fol. 2778] Mr. Wright: That is my understanding.

Q. Before writing to Mr. Kent had you had any conversation with the representative of the Fox exchange about second-run for Auburn?

A. I did.

Q. Who did you talk to?

A. I talked with Mr. Samson.

Q. Who was he?

A. Branch manager in Buffalo.

Q. When was that?

A. In the fall of 1937.

Q. What was the conversation you had with him?

Mr. McClennen: Same objection.

A. I asked Mr. Samson if there was a possibility of getting a second-run in Auburn, and I said to him, "At the present time you don't have any pictures running on a second-run basis. Could we make a deal?"

Q. What did he say?

A. He replied that Fox was selling an exclusive run to the—to their old customer.

The Court: You mean by "exclusive run", eliminating any second-run?

The Witness: There would be no further run after the one exclusive run.

Mr. Wright: Mark this letter with the next exhibit [fol. 2779] number for identification.

(Letter from 20th Century-Fox to Mr. Wallace, dated April 15, 1938, marked Plaintiff's Exhibit 815 for identification.)

Q. I will hand you this letter, marked for identification as Plaintiff's Exhibit 815, and ask if you received it on or about the date it bears?

A. Several days later.

Mr. Wright: I will offer the letter.

Mr. McClennen: The general objection.

The Court: There is no question about the signature, is there?

Mr. McClennen: Oh, no, your Honor.

The Court: Objection overruled.

(The letter, previously marked as Plaintiff's Exhibit 815 for identification was received in evidence.)

Mr. Wright: The letter is dated April 15, 1938, and reads as follows, on the stationery of 20th Century-Fox Film Corporation, and is addressed to Mr. H. P. Wallace, Manager, Capitol Theatre, 20 North Street, Auburn, New York.

"My dear Mr. Wallace: Thank you very much for your courteous reply to my recent letter. Of course, I am sorry not to agree with you. I do not see any relief for [fol. 2780] your situation as you outline it in the Neely-Pettengill Bill. There is still no law on the statute books that makes any one sell to anyone they do not wish to sell to. I think with copyrighted product we have the right to make an exclusive sale"—by the way, I notice there is a red line under the "exclusive sale."

Was that the mark you put on there?

The Witness: I put that on there.

Q. It was not on there when you received it?

A. No, sir.

Mr. Wright: "You understand I am not defending the exclusive sale. As a matter of fact, as a general thing I do not believe in it and I am not commenting on your situation, because I don't know the facts except as you give them to us. I am, however, asking for an investigation of your matter, which will be on my desk when I return from Europe the latter part of May."

By Mr. Wright:

Q. After you received that letter did you hear anything further from Fox with reference to that matter?

[fol. 2781] A. I did not.

Q. Can you tell us what, if any, effort you made to secure a second-run from Warner?

A. At the time that I had got the seven rejected pictures from Zurich, who represented Warner's, I asked him if it was a possibility——

Q. What time was that, again?

A. Well, that was sometime in the fall of 1937, but at that same time, the same—the same time I purchased those pictures, we discussed the possibility of a second-run. I asked him if——

Mr. McClennen: Same objection.

A. I asked Mr. Zurich if we could sign a deal for the complete product second-run.

Q. What did he say?

A. Mr. Zurich said that they have no second-run in Auburn, and it was his understanding that they were only selling one run in the town.

Q. Did he tell you why?

A. I don't recall that he—I can't recall that he did tell me why. I can't recall any further conversation.

Q. Then what efforts or whom did you see about the second-run of Paramount product?

A. I saw Mr. Myers, Fred Myers, who was the salesman in that territory, and Mr. Robinson, the Buffalo branch [fol. 2782] manager.

Q. When was that?

A. That was in 1936.

Q. Did you see them together or separately?

A. I saw them together and I saw them separately.

Q. You saw the salesmen first?

A. I saw Mr. Myers first.

Q. That was where, at Auburn?

A. At Auburn.

Q. What was the conversation you had with Myers in Auburn?

A. I first asked for some rejected pictures.

Mr. McClennen: Same objection.

A. Or some reissued pictures, and we did make a deal for a few reissued pictures, and the subject came up, I asked him, "Why can't we make a deal for second-run, and what protection would the Schine theatres get if we did make a deal for second-run in Auburn?"

Q. What did he say?

A. He told me did not see any reason why a second-run deal could not be worked out, and that the usual protection from first-run, which is thirty days, would naturally apply in Auburn, the same as in any other town.

Q. Was it after that you saw him and the branch manager?

A. I saw Mr. Myers and the branch manager together.

Q. When was that?

[fol. 2783] A. About six weeks later.

Q. Whereabouts?

A. At the office of the Capitol Theatre.

Q. What was said then?

Mr. McClennen: Same objection.

The Court: Same ruling. Proceed.

A. I asked Mr. Robinson, that if he had made up his mind about a second-run deal, what were the terms to be, and if he had decided on the time between the first and second-run; and I also asked him if they had any rejected pictures from Schine. He told me that he had a few old reissued pictures, which he sold me at that time. I can't remember the names of them. I have the contract there on them. But as far as the second run was concerned he had taken the matter up with Unger, and had received the information they were not to sell the second-run in Auburn.

Q. Did you have any conversation with any one from RKO about a second-run?

A. Well, RKO had been giving me a few pictures, either reissues or rejected pictures, and I cannot place the time exactly, but it was some time in 1937 that I talked with either Boasberg or Elmer Lux.

Q. Do you remember where you had the conversation?

A. At the office of the Capitol Theatre.

[fol. 2784] Q. What was said there?

Mr. McClennen: Same objection.

A. Mr. Lux pointed out to me that he did not think it would be a practical thing for me to run second-run and first-run on the same—that is, at the same theatre at the same time, and he discouraged me. He said, "I think it is not a good plan."

[fol. 2785] Q. What did you say?

A. I said that it might be worth trying out and I asked him if we could have part of their product second-run.

Q. What did he say to that?

A. He said he would take it up with the New York office and see if there was any possibility of selling me either part or all, and I said I would prefer to have part of it, and he said that he would take it up with the New York office and then let me know.

Q. Did you hear anything further from him in that connection?

A. No, sir.

Q. Now, who did you see at Metro or Loew's with reference to second-run?

A. I didn't talk to—I can't recall whom I talked to with Loew's. I talked with two or three salesmen during that period, there were two or three different salesmen in that territory. One fellow that called on me, he was the Rochester representative, and I can't recall his name.

Q. Well, did you have any discussion with him with reference to second-run?

A. I did.

Q. Whereabouts?

A. At the office of the Capitol Theatre.

[fol. 2786] Q. What was said?

Mr. McClennen: This is objected to further because of the lack of identification of the person, as well as the general objection.

The Court: Does the answer disclose who the representative was?

Mr. Wright: I don't think there was in the record all of the salesmen who represented Metro.

Q. Did you say you talked to a Metro salesman?

A. Yes, sir.

Q. Was it a salesman you knew?

A. It was a salesman I knew, and I knew his name, but I just can't recall it now.

Q. How long had you known him at the time?

A. Three or four years. His name is Weisman.

Q. And what was the conversation you had with Weisman?

Mr. McClennen: Same objection.

The Court: Overruled.

The Witness: I asked him for second-run pictures.

Q. What did he say?

A. He told me they had a first-run account in Auburn, and he understood that they were dealing on an exclusive-run basis, at that time.

Q. What time was that?

A. That was some time in 1936.

[fol. 2787] Q. Then did you make any further efforts to get a second-run from Metro?

A. Well, I discussed it with Mr. Harris in 1938.

Q. What time in 1938?

A. Early in 1938.

Q. What Mr. Harris was this, who was he?

A. I think his name was Abe Harris.

Q. And——

A. He was a salesman in the Buffalo or the Syracuse territory.

Q. Where did you talk to him about it?

A. In the Capitol Theatre, Auburn.

Q. What was the conversation then?

Mr. McClennen: Same objection.

The Witness: I said to Mr. Harris that I thought there was a lot of earning power still left in the M. G. M. pictures due to the short first-run playing time; by that I mean that the first-runs were shortened up so that there was a value left in the pictures, and Mr. Weisman said he would talk it over with the Branch Manager and see me again.

Q. Did he see you again about it?

A. No, sir.

Q. Whom did you talk to at the Universal about second-[fol. 2788] run, if any?

A. I think the fellow's name was Leiser.

Q. Was he a salesman?

A. I may be wrong in that, but I believe it was Leiser; he was a salesman.

Q. Well, did you talk to the Branch Manager about it at any time?

A. I talked to the Branch Manager about first-runs.

Q. About second-runs?

A. Not about second-runs.

Q. Well, when was the talk you had with Leiser?

Mr. McClennen: Same objection.

The Witness: I believe it was early in 1938.

Q. Where did you see him?

A. At the office of the Capitol Theatre.

Q. What was said then?

Mr. McClennen: Same objection.

The Court: Same ruling.

The Witness: He stated to me that they hadn't sold any second-run pictures for a period of years in Auburn, but he would see, he would ask the Branch Manager and at the same time he would find out if there were any old pictures or any rejected pictures available.

Q. Was that for second-run or first-run?

[fol. 2789] A. Well, a reissued picture would be a play back, and the rejected pictures would be first-run.

Q. Did you hear anything further from him about second-run?

A. No, sir.

Q. Had you had occasion to notice whether or not the second-run had been played in the town prior to 1935?

A. Prior to 1935, well, second-run had played in Auburn in 1932.

Q. And then after the Auburn was completed in December, 1938, did you notice whether second-run pictures began to be played in the town?

A. All the companies?

Q. A major second-run?

A. All the major second-runs played either at the Palace or Jefferson Theatre, with the exception of Fox.

Q. How about Columbia?

A. Or Columbia.

Q. With the exception of Fox and Columbia, you mean?

A. Fox and Columbia.

Q. Had you had any conversations with any representatives of United Artists about playing second-run there prior to that time?

A. The conversations I had with the United Artists always related to either first-run pictures, or old revivals of pic-

[fol. 2790] tures I had played in previous years.

Q. Now, calling your attention to the year of 1938, did you at that time make a visit to the Town of Canandaigua?

A. I did.

Q. For what purpose?

A. For the purpose of negotiating a deal with the Jenkins Estate to erect a theatre.

Q. And about when was that?

A. That was in the early part of April.

Q. And when you went over there did you have conversations with the Jenkins estate?

A. I did.

Q. Where was the property you were talking about?

A. The property was located on the west side of the main street, and it abutted the theatre, the Schine Theatre on the side street, the rear line of the Jenkins property was right adjacent to the——

Q. How many theatres were there in the town then?

A. One.

Q. That is the Schine Theatre you refer to?

A. Schine Theatre on a side street.

Q. Do you know about how large that town is?

A. Oh, I did have the exact figures on it, but I am guessing now when I say it was about 8,000.

Q. After you had this conversation, the first conversa-
[fol. 2791] tion about the Jenkins property, did you go back there?

A. We went back several times later.

Q. When you went back what, if anything, did you notice with reference to the lot across the street?

A. Some time later there was a sign posted on the property called the Flannagan property occupied by Montgomery Ward.

Q. Where was that with reference to the Jenkins property?

A. That was on the east side of the street and somewhat down from it.

Q. What did you see there on the Flannagan property?

A. Well, there was something about a new theatre will be erected by Schine or the Schine organization, or some such thing like that.

The Court: Near Flannagan's restaurant, was it that place you mean?

The Witness: Yes, sir.

Q. Did you go any further with the plans to erect a theatre in the Jenkins property?

A. We did.

Q. What did you do then?

A. Why, some time later I went back and I discussed with Mr. Hymes, the attorney for the Jenkins Estate, and with Mr. Jenkins, the possibility of completing a deal.

Q. Just limit yourself to whether or not you had a further discussion.

[fol. 2792] A. Yes, we did have a further discussion.

Q. The answer to that, I take it, "Yes"?

A. Yes, sir.

Q. After the further discussion did you go ahead with any plans for a theatre there?

A. Yes, we had tentative plans drawn, that is, a ground plan, and we discussed the general terms of the lease, and

we arrived at a satisfactory conclusion on the general terms of a lease.

Mr. McClennen: May that be stricken out?

The Court: Strike it out.

Q. Limit yourself to an answer to the question.

Mr. Wright: What was the last question?

(Question read.)

Mr. Wright: Strike out beginning with "and we discussed".

Q. Then did you build a theatre there?

A. No, sir.

Q. Have you been back there since?

A. You mean after the date of this discussion?

Q. After you abandoned your theatre project?

A. No, sir.

Q. Do you know whether or not the theatre was ever erected on the Flannagan property?

A. I do.

Q. Was it or wasn't it?

[fol. 2793] A. There wasn't.

The Court: How do you know if you never went back there?

The Witness: Well, not with reference to the Jenkins property, but I have been back a great many times.

The Court: I understood counsel——

Q. You mean you have been through the town?

A. In the town, yes, sir.

Q. How far is that from Auburn?

A. Why, I should say 65 miles or 70 miles.

Q. Do you recognize this Exhibit 812 for identification as a copy of a lease that you made for the Strand Theatre in Syracuse?

A. I do, yes, sir.

Mr. Wright: I will offer this lease, Exhibit 812 in evidence.

(Lease previously marked as Plaintiff's Exhibit 812 for identification was received in evidence.)

Q. When was it, after you made this lease, Exhibit 812, you opened the Strand Theatre?

A. September 20th, 1941.

Q. And how long did you operate it?

A. Until, I believe, January 28th or February 1st, 1942.

Q. Between what dates?

[fol. 2794] A. Somewhere between January 28th and February 2nd, I don't know which of those two dates.

Q. Did you prepare a list of the feature products you played there during that period?

A. I didn't hear you.

Q. Have you got a list of the pictures you played there during the period of operation?

A. I have.

Q. Could I see it?

(List produced.)

Mr. Wright: I will ask to have this list that has just been handed to me marked the next exhibit number for identification.

(Thereupon list of pictures played at Strand Theatre, Syracuse, referred to, was marked as Plaintiff's Exhibit No. 816 for identification.)

Q. Can you tell the Court what is tabulated there on Exhibit 816 for identification?

A. That is a list of the play off of pictures from September 20th, 1941 through January 26th, 1942. These are the pictures we played at the Strand Theatre during that period of time.

Q. What are the dates there in the column, your play dates are from September 20th, 1941 to September 24th, 1941, [fol. 2795] and September 27th, 1941; the date is opposite the picture that played, that began to play on that date?

A. On that date.

Q. And the next date is when the picture listed opposite began to play?

A. That is right.

Q. Then the next column gives the titles of the pictures?

A. Yes, sir.

Q. And under the third column you have the name of the producer or distributor?

A. Producer or distributor.

Q. Then you have some figures written in the last column, are those the rentals paid?

A. I added some notations later of the rentals paid for these various pictures.

Q. Then what are these figures down at the bottom?

A. That is an analysis of all of the pictures that were played from September 20th, 1941 through January 26th.

Q. You mean an analysis of those features that are listed there?

A. Of all of these features.

Q. What kind of an analysis?

A. Well, it segregates the various pictures into first-run pictures, second-run pictures, third-run pictures, the pictures reissued, foreign pictures, independent pictures, and one short subject show.

[fol. 2796] Q. I don't see any statement there in the summary with respect to independent pictures.

A. Independent and Western——

Q. I beg your pardon. Over to the right-hand side.

A. That refers to P. R. C., Producers Releasing Corporation, and Film Classics, and other independent pictures, and this one short subject show, that is a designation for a number of short reels that were used in place of a feature.

Q. Do you know whether the Empire Theatre was operating in Syracuse during the time that you operated the Strand?

A. It was.

Q. By whom?

A. By Schine.

Q. Have you got a list there of the pictures that played the Empire during the same period?

A. I have.

Q. Could I see it?

Mr. Wright: I will ask to have that marked with the next exhibit number, 817 for identification.

(List of pictures playing the Empire Theatre was marked as Plaintiff's Exhibit 817 for identification.)

The Court: Does it appear when Schine took over the Empire?

Mr. Wright: I think it probably appears in the inter-
[fol. 2797] rogatories. We may as well read that into the record.

Under the answers to interrogatory No. 17, A, on page 10 of the answer, it appears that the town "In Syracuse"; "Name of theatre—Empire."

Under the column, "Nature of interest—Lessee." "Extent of interest—30%." "Date acquired—January 1, 1941." "Other interests, if any, and extent thereof—B. F. Keith Corporation, RKO-Schine operation".

The Court: How did they acquire title?

Mr. Wright: This is a lessee. They leased it.

The Court: How did they acquire title?

Mr. Wright: It does not specify here. It says, under the column, "If leased, name of lessor", and the name appears "Massachusetts Mutual Life, Springfield, Massachusetts", so I assume it was leased from the same lessor that Mr. Martina had.

The Court: I did not know whether there was anything in between that.

By Mr. Wright:

Q. Do you know when the Empire was opened, Mr. Wallace, by Schine?

[fol. 2798] A. To the best of my knowledge it was opened on September 12, 1941.

Q. That was about a week before you opened the Strand?

A. Just a week before.

Q. Had it been closed prior to that?

A. It had been closed.

Q. For how long, if you know?

A. To my knowledge it had been closed all that summer, I think, from March through September.

Q. By "that summer" you are referring to 1941?

A. Summer of 1941.

The Court: Had it been operated after January, 1941, up to the summer of 1941?

The Witness: It is only a recollection with me, that there were some road shows in there. That is, some shows that were sold on the basis of $1.65 per seat, regular road show attractions, but I would not vouch for the authenticity of that statement.

Q. In any event, it reopened on September 12th?

A. Yes, sir.

Q. And this tabulation here which you prepared, marked for identification as Plaintiff's Exhibit 817, shows what in the first column?

A. That shows the play date of the picture or the show at [fol. 2799] the Empire Theatre, starting September 12, 1941.

Q. Is the date in each case the starting date of the product listed opposite?

A. Yes, sir.

Q. Where you have two feature titles there, they were double features?

A. They were double features.

Q. The figures opposite the title, the dates on these in the third column, what are they?

A. That is the year the picture was released, the season, rather.

The Court: How would you know when it was released?

The Witness: From the various exhibitor trade papers, trade journals, that were put out by various companies and that had been reliable and reasonably accurate over a period of fifteen years to my knowledge.

Mr. Wright: Of course, we have the release schedules themselves in evidence here.

The Court: He has testified to their being released a certain period.

Mr. Wright: I just asked him what the figure indicated on the tabulation. I suppose the best evidence of when the picture was actually released, of course, would not [fol. 2800] necessarily be this tabulation but the actual release schedules which were identified here.

By Mr. Wright:

Q. The next column shows the name of the distributor or producer of the picture?

A. Yes, sir.

Q. Then you also show the admission prices that were charged?

A. I do.

Q. I notice in some cases no admission prices appear. You did not have data as to the admission prices in those cases?

A. No, I did not.

Q. Where you have the statement "On stage" that refers to, not a film, but a stage show?

A. Stage attraction.

Q. Then I notice you have the statement "Move-over" noted here after pictures listed opposite December 3rd. What does that mean?

A. That was moved over from one of the other Schine operations, first-run.

Q. One of the first-run?

A. That is a first-run.

Q. Continued first-run?

A. Continuation of the first-run, move-over or continuation of the first-run.

[fol. 2801] Q. Then I note that the last date you have here is February 10, 1942?

A. Yes, sir.

Q. Was it closed then?

A. At that time.

Q. Will you tell us, Mr. Wallace, what efforts you made to get product for that theatre during the time you operated it, or before?

A. On September 9th I sent a wire to Metro-Goldwyn-Mayer in Buffalo and asked the representative——

Q. Now, first limit yourself to what you did, without attempting to state any of the contents of these communications.

A. I sent a wire to Metro-Goldwyn-Mayer.

Q. To any one else?

A. To Paramount, RKO, Universal, United Artists, Fox and Columbia.

Q. Did you have any discussions or conversations with any of the sales representatives of those companies?

A. I did.

Q. With whom?

A. With Metro-Goldwyn-Mayer. Do you want me to——

Q. Whom did you talk to there?

A. I talked with Mr. Harris and Mr. Maw.

Q. Mr. Harris was what?

[fol. 2802] A. Mr. Harris was the Syracuse salesman and Mr. Maw was the Buffalo branch manager.

Q. Where did you see them?

A. At the office of the Strand Theatre in Syracuse.

Q. When was that?

A. That was on—it was several days later. I think it was two days later, September 11th—three days later.

Q. Several days after you sent the wire?

A. Some time after I had sent the wire to Buffalo.

Q. What was the conversation you had with them?

Mr. McClennen: Same objection.

A. I asked Mr. Maw for any first-run pictures which they were not using in their own house, that is, the Loew house. I asked him if there was a possibility of buying second-runs. I asked him for third-runs and I asked him for subsequent runs.

Q. What did you mean by the term "subsequent runs"?

A. That means a run that is enjoyed by a number of the smaller neighborhood theatres on a day and date basis, practically at the same time.

Q. That is following the first three runs?

A. First three runs.

Q. What was said by—who was it, Mr. Maw?

A. Mr. Maw.

Q. What did he say?

[fol. 2803] A. He stated that I knew very well that Loew's was their own theatre and that they had no first-run pictures which Loew's did not play, that they had a second-run which had been established for years; that they had a third-run choice of the Cameo, Riviera and Palace theatres. I don't know whether the third-run was sold, but that was the established idea, to sell one of those three theatres the third-run, and that I posed a very peculiar problem by asking for subsequent run in a big downtown house, but he would give it some consideration and would let me know. He stated——

Q. Just a minute. In that conversation did you have any discussion with reference to the admission prices you were going to charge at the Strand?

A. We did.

Q. What was said about that?

Mr. McClennen: Same objection.

The Court: Overruled.

A. Well, we were—if we purchased any pictures we would be obliged to charge 28 to 35 cents, due to the fact that it was a very well appointed theatre, and that it was a downtown theatre.

Q. Did you see him again?

A. I talked with him on the 'phone—

Q. That calls for a yes or no.

[fol. 2804] A. No, I did see him again, yes. Pardon me.

Q. Before you saw him again you talked to him on the 'phone?

A. I talked to him on the 'phone.

Q. When was that?

A. That was two days after the conversation we had at the office of the Strand Theatre in Syracuse.

Q. What was said over the 'phone?

A. I discussed with Maw the possibility of some old pictures, proven pictures.

Q. What do you mean by "proven pictures"?

A. Pictures that had been made over a period of ten years, prior to 1941, that had definite box-office value in some instances, and when they played back at times they earned a certain amount of revenue.

Q. Those which had been outstanding box-office successes when they were first played?

A. Yes, for years back.

Q. Go ahead.

Mr. McClennen: Same objection.

The Court: Same ruling. Go on.

A. Mr. Maw told me that Schine had asked for those pictures in July of that year for the Empire Theatre.

Q. Was anything else said?

A. However—he said, however, that he would not see me stuck and he would send Mr. Harris down to Syracuse [fol. 2805] to see if we could not work out a deal on 1940-1941 product.

Q. Then did Mr. Harris come down to see you?

A. He did.

Q. Where did you see him?

A. At the office of the Strand Theatre in Syracuse.

Q. What was the conversation with him?

Mr. McClennen: Same objection.

A. I asked him for a proposal on the 1940-1941 product and he made a proposal to me, which was reduced to writing.

Q. Have you got a copy of it?

A. I don't know. There is a copy somewhere.

Q. You say "reduced to writing". Was there any application taken?

A. No, sir.

Q. Nothing of that sort. You mean some notes were made?

A. Notes.

Mr. McClennen: That is objected to. If it is on paper, the paper would show. The contents ought not to be stated.

The Court: All he said was that there were some notes taken. No testimony has been stated to show the contents.

By Mr. Wright:

[fol. 2806] Q. Just tell us as nearly as you can recall what conversation you had with Harris at that time, what you said to him and what he said to you.

A. Well,——

Mr. McClennen: Same objection.

A. Mr. Harris said to me, "I have a deal that I have been instructed to sell you. It is a split deal, half to go to you and half to go to Schine at the Empire Theatre. The provisions of this deal are as follows: That these pictures are to be run after other theatres in Syracuse complete their play-off. By that I mean all the small neighborhood houses, after all subsequent runs."

That there was a split of 52 pictures. We were to get 26 and the Empire was to get 26. I said to Mr. Harris, "Who will make the split?" He says, "Well, it is my understanding that Mr. Maw will make that arrangement himself. He will select the pictures himself, give you what he feels you should have and the Empire Theatre what they should have, and that split will be arranged in Buffalo by Mr. Maw." I objected to that as being an offer that was not fairly valid.

He also imposed the added burden on us——

Mr. McClennen: May that be stricken?

The Court: Yes.

Q. Confine yourself to what he said.

[fol. 2807] A. He also said, "Your admission prices naturally will be 28 and 35 cents, and these pictures are to be run after all other runs."

I stated to him that the pictures were running in 15 and 20-cent houses and asked him how he justified that position. He stated that was his instructions and he could not deviate from it, and I rejected the offer.

Q. Then did you have any further conversation with any one from Metro about pictures for the Strand?

A. No, I did not.

Q. Then what, if any, conversations did you have with the Fox people?

A. I sent a wire to Mr. Samson——

Q. I think you already said you sent the wire. Was this after that?

A. On September 11 Mr. Samson and Bill Rowell, Syracuse salesman, called at the office of the Strand Theatre.

Q. When was it that he called?

A. September 11.

Q. This was before the theatre opened?

A. Yes, sir.

Q. What was the conversation you had with Mr. Rowell?

Mr. McClennen: Same objection.

A. I asked Mr. Samson for first-run——

[fol. 2808] Q. Mr. Samson called on you there?

A. Mr. Samson called on me and Mr. Rowell.

Q. Mr. Samson and Mr. Rowell both?

A. Mr. Samson was the one I had the conversation with. Mr. Rowell just sat back and observed it.

Q. What was said?

A. I asked Mr. Samson for first-run pictures, if there were any available, and any second-run pictures or third-run pictures, or sub-run pictures.

Q. What did he say?

A. He replied that I knew very well that Schine had been the established account of Fox in Syracuse for a great many years, and I asked him if Schine rejected any pictures could he sell me any. He said, "Schine isn't rejecting any pictures." I asked him if he had a second-run available and he stated that he had an established second-run at the Regent Theatre, and in response to my request for third-run pictures he told me that he had not sold third-run pictures but that over a period of years there was an established third-run in the town, and I knew very well that the Strand was not entitled to fit into the scheme of things in the theatre situation in Syracuse as a third-run. He told me that at the present time he could not offer me any sub-run pictures for [fol. 2809] the reason that I would upset the—his sales possibility or would upset something with regard to the sub-

sequent run theatres in Syracuse, and he could not give me a subsequent run.

[fol. 2810] Q. Then did you have any further conversation with him or Mr. Rowell before he left?

A. He said he would consider the matter and see if there was a possibility of giving us some old pictures, some old revival pictures or some pictures after the theatres of Syracuse had finished playing them.

Q. Did you hear from him again?

A. Mr. Rowell called on, I believe, October 3rd, or some time early in October.

Q. Called where?

A. The theatre, at the Strand Theatre in Syracuse.

Q. That was after the theatre was opened?

A. Yes, sir.

Q. What was said then?

Mr. McClennen: Same objection.

The Court: Same ruling.

The Witness: Mr. Rowell said to me "I have brought down a deal that Mr. Samson has decided he wanted to offer you." The deal was reduced to writing and——

Q. Have you got a copy of that?

A. I have.

Q. Got it with you?

A. No, I think it is over there in those papers.

Mr. Wright: I will ask to have this marked with the [fol. 2811] next plaintiff's exhibit number.

Mr. McClennen: For identification?

Mr. Wright: Yes.

(Thereupon document referred to, was marked as Plaintiff's Exhibit No. 818 for identification.)

Q. Will you look at this document marked 818 for identification, and tell me whether that is the deal you referred to?

A. That is the deal I refer to, yes, sir.

Q. Whose handwriting is that?

A. That is in Mr. Rowell's handwriting.

Q. Is that true of the part that is in pencil as well as the blue writing on there?

A. That was put on in my office, this pencil. This is a carbon copy. One copy was left in Buffalo. This copy

was brought with him, he told me, and this he added on in Syracuse, this part here (indicating).

Q. The part that was in blue was on the deal as he brought it to you?

A. Yes, sir.

Q. How about this notation in pencil "650 bingo programs"?

A. I wrote that.

Q. And this "50-50 over $1200"?

A. I wrote that.

[fol. 2812] Q. Other than those pencil notations are all of the writings on these three pages that comprise Exhibit 818 for identification in Rowell's handwriting?

A. Yes, sir.

Q. And do you recognize this document that is clipped to Exhibit 818 for identification?

A. That is a release schedule.

Q. Was that clipped to it at the time it was handed to you?

A. Yes, sir.

Q. These names in the left-hand column of the first page are picture titles?

A. They are.

Q. The figures in the next column are proposed rentals?

A. Yes, sir.

Q. Was the notation that appears over on the right-hand part of the first page explained to you at the time that the deal was handed to you?

A. It was.

Q. What did that mean, what did he say that meant?

A. That meant that when we booked one of these old pictures for $75 we were to book a companion picture for $40.

Q. By old pictures you are referring to the titles on the left and opposite the $75 figures?

[fol. 2813] A. I am referring to both columns. They are both old pictures. These were old outstanding pictures and these were old pictures that had no relative box-office value.

Q. Now, this second page, can you tell us what that refers to?

A. That refers to a block of five pictures, the first block of five under the new selling arrangement.

Q. That was current product which was then released or about to be released?

A. It was current product that was released, but it was not current product as it was offered to me.

Q. What was said to you with reference to when that would be made available to you?

A. It was to be made available to me after all Syracuse runs and with the further stipulation that the dates on which we could play the picture was to be made a part of the contract.

Q. The third page, what are the pictures that appear on the left-hand column there?

A. Those are pictures, a group of 25 pictures, this part, selected group of pictures from the 1940-41 season.

Q. The left-hand column?

A. They were priced at $100 each.

Q. That is ten at $100?

[fol. 2814] A. I think so, ten at $100.

Q. And the other 15 were to be at $50?

A. $50.

Q. Were these pictures that are listed on these three sheets offered to you all together or alternatively?

A. They were offered to me all together.

Q. What was the conversation you had with Mr. Rowell with respect to that offer?

Mr. McClennen: Same objection.

The Court: Well, the statement about an offer isn't of much value unless you know what the offer was, the offer itself.

Mr. Wright: I will offer the exhibit in evidence.

Mr. McClennen: That is objected to.

The Court: Sustained.

Mr. Wright: I beg your pardon, that is the paper written by Mr. Rowell.

The Court: All right, I will receive it. That is a memorandum made at the time and presented to you at the time you had this conversation?

The Witness: Yes, sir.

The Court: Overruled.

(Thereupon document previously marked as Plaintiff's Exhibit 818 for identification was received in evidence.)

[fol. 2815] Q. Now, tell us, as near as you can recall, what the conversation was that you had with Rowell with reference to that Exhibit 818?

A. I told Mr. Rowell that I didn't want any pictures that were from three to six years old; that I didn't want to play the pictures after the very small theatres in Syracuse, which charge 10 and 15 cents admission, and that the percentage that had been outlined on this first block here was not in accordance with my plan of running the theatre, and using bingo, and that I did not believe that he should restrict our use of these pictures at a 28-cent admission, when he had previously allowed them to be sold at the small theatres for 10 and 15 cents.

Q. What did he say?

A. He said these were the instructions that he received from Mr. Samson at Buffalo; they had gone over the thing thoroughly, and "That is the best we can do for you; you know we must protect the Schine account in Syracuse, and if you don't want them, it is all right with me, we will still be friends."

Mr. McClennen: I move that that answer be stricken out, if your Honor please, particularly this latter part. I apprehend the same ruling on the motion.

The Court: Well, I will let it stand. It is part of the [fol. 2816] transaction, I suppose.

Q. Did you reject that offer?

A. I told Mr. Rowell that it didn't constitute a valid offer, and I rejected it.

Q. Did you hear anything further from the Fox Company?

A. No, sir.

Q. What conversation, if any, did you have with a representative of Paramount with respect to pictures for the Strand?

A. Well, on September 9th I sent a wire to Paramount and about September 15th, Mr. Rosineau, the Syracuse Salesman, called at the office of the Strand Theatre, and he offered me several pictures. After I had requested some first-runs, some second-runs, third-runs or subsequent-runs, he told me there were several——

Mr. McClennen: Same objection.

The Court: Overruled.

The Witness: Mr. Rosineau said "I have several pictures for you; they are from 3 to 8 years old, and I have one particular picture called "The World in Flames", which has not had a run in Syracuse, and he offered it to me first-run.

Q. What kind of a picture was that?

A. That was highly controversial picture. It was made [fol. 2817] up of old news reel clippings, and I rejected it.

Q. Anything else offered?

A. He told me that he had a second-run in Syracuse, and that he had a third run and as far as subsequent-run was concerned, he would discuss that with, I think, Robinson, he said, and he would call on me later.

Q. Did he?

A. He did.

Q. When was that?

A. Around the first of October.

Q. Where?

A. At the office of the Strand Theatre in Syracuse.

Q. What was said then?

Mr. McClennen: Same objection.

The Witness: Well, he did, and Rosineau said that Mr. Robinson had instructed him to offer me a block of five pictures, and with the stipulation that we could use that block of five pictures after all the subsequent runs in Syracuse had finished playing the pictures; that he saw little use of offering the pictures, but he was going through the mechanics of offering them, because the pictures would [fol. 2818] not become available to me until January, and he said that "From your conversation I understand you need pictures desparately now." He said "I have been instructed to offer these pictures, and I am offering them." I turned his offer down.

Q. Why wouldn't the pictures become available until January?

A. Some of those pictures had just started to play first-runs and when they would work through their periods of protection from second and third-run and subsequent-run there would be an intervening period of time that would preclude the possibility of the Strand Theatre getting the pictures any time prior to January 1st.

Q. Was there anything said in that conversation with reference to the admission prices you were supposed to play them at?

A. He stipulated——

Q. Say what he said.

A. Mr. Rosineau said "I realize you have a beautiful theatre here with large seating capacity. There is one restriction I must call to your attention. These pictures must be played at 28 cents minimum."

Q. Now, then, did you have any further conversation with him?

A. I had a further conversation several days later.

Q. Where was that?

A. At the office of the Strand Theatre, Syracuse.

[fol. 2819] Mr. McClennen: Are we still in October?

Q. Are we still in October?

A. Several days after October first or third, I just can't recall what day it was, but it was within a few days.

Mr. McClennen: Same objection.

The Court: Same ruling.

Q. What was said then?

A. Mr. Rosineau said "I have some pictures for you." I said "Thank you, what are they?" He said "I have arranged with Robinson to get you a split of three Western pictures, but these pictures will not be available to you until some time in January, the latter part of January, due to the fact that this split will work this way, 1, 3 and 5 will go to your opposition"—and he didn't mention who the opposition was—"2, 4 and 6 will go to you", so that "Hop Along Cassidy", a Western picture, would be available about February 1st.

Q. Is that the title of this picture?

A. The "Hop Along Cassidy" series, six Western pictures.

Q. Three of them were offered to you?

A. Three of them were offered to me.

Q. Did you accept that offer?

A. No, sir.

Q. Did you have any further conversation with the Paramount representative? Were there any further offers made [fol. 2820] to you?

A. No.

Q. Now, who at R. K. O. did you see with reference to product for the Strand?

A. Mr. Ed. Smith.

Q. Who was he?

A. He was the Syracuse salesman.

Q. Where did you see him?

A. At the office of the Strand Theatre.

Q. When was that?

A. On September 11th.

Q. That was before you opened?

A. Yes, sir.

Q. What was the conversation you had with him?

A. I asked Mr. Smith for some first-run pictures or some second-run pictures, and I said "There are about six or eight pictures unplayed by Schine, which have aged considerably, they are considerably beyond the average playing time; can I get them?" He said "I think you can." We negotiated a deal and signed contracts for five pictures.

Q. Have you got those contracts?

A. Well, they are over there (indicating papers on desk).

Mr. Wright: I will ask to have this group of documents [fol. 2821] stapled together marked with the next Plaintiff's Exhibit number for identification.

(Thereupon five documents were then marked as Plaintiff's Exhibit No. 819 for identification.)

Q. I will hand you this Plaintiff's Exhibit 819 for identification, and ask you if those are the documents that you signed at that time that you refer to as contracts or copies of them?

A. These are copies of the contracts that were signed in my presence.

Q. They are signed by Charles—do you recognize that as the signature of "Charles Carr"?

A. I do.

Q. Who was he?

A. The President of the Syracuse Community Theatre Corporation.

Q. That was the lessee corporation of the Strand?

A. Yes, sir.

Q. Then after these documents here were signed, did you

hear anything, or what further conversation did you have with respect to them?

A. What further conversation did I have with whom?

Q. With whoever the salesman was.

A. Mr. Smith?

[fol. 2822] Q. Mr. Smith.

A. Mr. Smith, after the contracts were signed by "Carr", called up Elmer Lux.

Q. Who was Elmer Lux?

A. Branch Manager of R. K. O. Radio Pictures Corporation.

Q. What exchange or branch?

A. At the R. K. O. Exchange.

Q. Was this call made in your presence?

A. It was made in my presence.

Q. And where was Lux reached, do you know?

A. Reached at the office of Warner's Theatre in Albany.

Q. Did you hear what Smith said at the time?

A. I did.

Q. What did he say?

Mr. McClennen: Same objection.

The Court: Overruled. You may answer.

The Witness: He told Mr. Lux that he had negotiated for some pictures, and it was urgent that they get play dates. Mr. Lux said "Give me"—Mr. Lux then talked to me on the phone; Mr. Smith then turned the phone over to me, and I talked to Mr. Lux.

Q. What did you and Mr. Lux say?

Mr. McClennen: Same objection.

The Witness: I said to Mr. Lux "You know we are open-[fol. 2823] ing on the 20th. It is imperative that we have immediate play dates on the features." Lux said "You have the pictures, put Ed. Smith back on the phone and I will tell him to call Buffalo and get you prints on the pictures you want".

Q. Did Mr. Smith then call Buffalo?

A. Mr. Smith called Lux, the Buffalo Branch Manager, and confirmed the conversation I had with him and he then called Buffalo for dates on these various pictures.

Q. What dates did he report back to you for the pictures?

Mr. McClennen: By whom?

Q. Smith, what was said with reference to specific dates?

A. I said to Mr. Smith "I want September 24th to 26th on a picture called "They Meet Again", and I want September 27th-30th on a picture called "Hurry, Charlie, Hurry", and he talked with the booker in Buffalo, and confirmed those dates.

Q. Then did you do anything with reference to advertising the pictures that you bought?

A. I did.

Q. What did you do?

Mr. McClennen: That is objected to.

The Court: I will let him state. What did you do in the way of advertising, printing in the papers or pos-

[fol. 2824] ters?

A. We had a front erected.

The Court: What?

The Witness: We had a painted front erected, like theatres usually have, a false front erected for the theatre. We had posters on the various sides, three-sheet posters on the sides of the theatre, and had programs scattered throughout the town and other mediums of advertising usually used.

The Court: That is sufficient. I don't know what is usually used.

Mr. Wright: Will you mark this telegram with the next exhibit number?

(Thereupon telegram referred to was marked as Plaintiff's Exhibit No. 820 for identification.)

Q. Do you recall receiving this Exhibit 820 on or about the date it bears?

A. I do.

Mr. Wright: I offer this in evidence. This is a telegram, if the Court please, R. K. O. Radio Pictures, Inc., addressed to the Strand Theatre.

The Court: What does it say?

[fol. 2825] Mr. Wright: "Impossible to supply".

Mr. McClennen: Just a moment.

The Court: Let me see it.

Mr. Wright: Is it received?

The Court: Yes.

Mr. McClennen: We objected to it.

The Court: Is it authenticated?

Mr. Wright: We could not authenticate it except as a paper received by the witness, but not beyond that.

The Court: Do you take it as a paper sent by R. K. O.?

Mr. McClennen: No, we do not.

Mr. Wright: I think that will appear. The third and fourth words are marked The "Hurry, Charlie"; do you know what they refer to?

Mr. McClennen: I understood his Honor to say it was not admitted in evidence, and, therefore, there should be no reference to its contents.

The Court: It already appears it was one of the pictures he had requested a date for, and the date he had requested.

[fol. 2826] Mr. Wright: I will offer this Exhibit 819 in evidence.

Mr. McClennen: Those are objected to.

Mr. Wright: Exhibit 819 consists of the five contracts signed at the meeting with salesman Smith.

Mr. McClennen: When Mr. Wright says "signed" he means signed——

Mr. Wright: By Mr. Carr.

Mr. McClennen: Not ever signed by RKO or any representative of RKO.

Mr. Wright: That is quite right.

The Court: Any representative in authority?

Mr. McClennen: No, no representative. They are not signed at all.

Mr. Wright: These are his copies, which are signed only by Mr. Carr.

The Court: Mr. Carr was an employee of the Company?

Mr. McClennen: Was the employee of Mr. Wallace's company. These papers are not signed and do not purport to be signed by anybody for RKO.

Mr. Wright: Mr. Smith brought them over. An original and a copy were signed by Mr. Carr on behalf of the Strand Theatre and, as I understand it, the originals were taken by Mr. Smith. Is that right?

The Witness: That is correct.

[fol. 2827] Mr. Wright: These that have been identified as Plaintiff's Exhibit 819 are the copies that were retained in the files of the Strand Theatre?

The Witness: Yes, sir.

The Court: Signed by Carr? The mere retention of the copy is no proof of the execution of the original. Ordinarily the copy you retain would be signed by the other party.

Mr. Wright: As to two of these, your Honor, I am not attempting to prove they were ever signed by RKO. I merely want to show what happened with reference to this contract application that Mr. Smith took with him after his conversation with the witness.

The Witness: May I see the contracts, please? Here is the signature of the man that signed them, E. J. Smith.

Mr. Wright: The witness calls my attention to the fact Mr. Smith's name appears up at the top of each of these, and he apparently signed them in the place marked for the salesman. There is, as I see it, no dispute that these are true copies of the documents that Mr. Smith took from the witness at that time.

[fol. 2828] The Court: If some one of the parties made a memorandum of what took place would that be of any materiality or competent? The witness testified to what took place.

Mr. McClennen: If your Honor please, before it goes further, may I call your attention that this "E. J. Smith" does not purport to be a signature. It is written in the block describing who the salesman is. It is not the signature, but the place for signature is at the bottom, and there is no signature thereon of anybody.

By Mr. Wright:

Q. Is this document, Plaintiff's Exhibit 819, in the handwriting of Mr. Smith, or do you know, down to the signature of Mr. Carr?

A. I do know, and it is.

Q. That was written by him at the time you talked to him?

A. Yes, sir, that is Mr. Smith's signature.

Mr. McClennen: I ask that that be stricken out. It is not his signature. It shows on its face that it is not. It is Mr. Smith's name in the salesman's block, as being the salesman. I ask that that characterization be stricken out.

[fol. 2829] The Court: I think the characterization should be stricken out. You may show where it appears and the Court will say what the effect of it is. As far as that is con-

cerned, I will receive the papers. They were written, you say, by——

The Witness: Mr. Smith, E. J. Smith.

The Court: He left the copy with you?

The Witness: Yes, sir.

The Court: And took one?

The Witness: He took three copies with him.

The Court: Why didn't he sign this one?

The Witness: I have no answer for that.

The Court: Overruled. Received.

(The document referred to, previously marked as Plaintiff's Exhibit 819 for identification, was received in evidence.)

Mr. McClennen: I should recall to your Honor's attention the early undisputed testimony that these contracts are not binding until they have been signed at headquarters and until they are such, I respectfully submit, they ought not to be received in evidence.

The Court: I have received them, considering that additional testimony must be offered with reference to them. [fol. 2830] There has been offered here a telegram. It has not been received in evidence, and there are certain dates that relate to the picture mentioned in this contract. I think the memorandum made by the agent of one of the major distributors here is competent only as a memorandum of what took place there, not to show that the contract was made. I don't think it is claimed that the contract was made.

Mr. McClennen: If it is clear that no contract has been made, we still persist that it should not go in evidence.

The Court: Assuming that be true, I think it would be competent. Objection overruled.

By Mr. Wright:

Q. I call your attention, Mr. Wallace, to the word "Cancel" that is written across the contract in this Exhibit 819. That refers to "They Meet Again", and the same word written across the one reading "Hurry, Charlie, Hurry", and ask if that was written on there by you?

Mr. McClennen: That is objected to, your Honor, as characterizing that as a contract.

The Court: Of course, if it is written on there by him [fol. 2831] it is self-serving and incompetent.

Mr. Wright: It is referred to in the printed form as "Special license agreement". I do not wish to characterize it in any other way.

Mr. McClennen: It is characterized in the question. I submit that the characterization should go out.

The Court: You are referring to something that was not in the contract when it was made, apparently, and the answer already given and the inquiry is incompetent, in my judgment. Strike out any reference to the work "Cancel". I take it that that was written in there after the contract was made, was it not?

Mr. Wright: Yes, I was going to ask him when he wrote that in there with reference to the receipt of the telegram that is marked Plaintiff's Exhibit 820 for identification.

Mr. McClennen: If your Honor please, we must urge that no contract was made.

The Court: I am assuming that.

Mr. Wright: We all agree on that.

The Court: I assume that is a memorandum made, I take it, of certain discussions that were submitted to [fol. 2832] somebody for authorization.

By Mr. Wright:

Q. After you received this telegram that is marked Plaintiff's Exhibit 820 for identification did you actually receive an approved copy of the contract or the document here which has on it the title "They Meet Again" and the document with the title "Hurry, Charlie, Hurry"?

A. We did.

Mr. McClennen: That is objected to as stating the contents of a document.

The Court: Let him state what was done.

By Mr. Wright:

Q. Did you play those pictures, either of them, at the Strand Theatre?

A. No.

Q. Then after you received this telegram marked Exhibit 820 for identification did you have any conversation with any representative of RKO?

A. I did.

Q. Who?

A. Mr. Smith.

Q. Where?

A. At the Strand Theatre.

Q. How long after that was it?

A. It was the same day I received this telegram.

[fol. 2833] Q. What was said then?

Mr. McClennen: Same objection.

The Court: Overruled.

A. Mr. Smith says, "Did you get any wire from the RKO office withdrawing the two pictures we had sold you?" I said, "Yes, here is a telegram." He said, "I suppose that will throw your opening date back." I said, "Under no consideration would I change the opening date of the picture, but why, with a picture sold to us, why were they confirmed on the telephone and then withdrawn from us?" He said to me that Schine made very strenuous efforts to get those pictures and to book them within a week or so of the time that we wanted them, after the pictures had been confirmed to me, and that Elmer Lux had nothing to do with it, that the New York office through a fellow by the name of Meyers, who has charge of the booking or buying or something, the pooling arrangement, in Syracuse, called Elmer Lux and said that these pictures will have to go to Schine. I did not get the pictures.

Mr. McClennen: Just a moment. If your Honor please, I move that that answer be stricken out. I submit respectfully to your Honor that that sort of thing, to come in and drag in by the heels a charge against the defendants [fol. 2834] here, who had nothing whatever to do with it in any way, would violate the most fundamental principles of justice. I urge that that be excluded.

The Court: How would this agent know what took place in New York and what somebody in New York said to somebody else about it? How would that be within his knowledge?

Mr. Wright: I assume, having taken the application there, it was certainly up to him to follow it through and find out what happened to it.

The Court: One man said to another man, and another man said to another man.

Mr. Wright: I supposed he certainly was competent to explain to the witness what happened in the RKO exchange with reference to these application that he had solicited.

The Court: It seems to me it is going far afield. Objection sustained.

By Mr. Wright:

Q. After you talked to Smith did you have any conversation with the exchange manager?

A. No, sir.

Q. You did nothing further with reference to getting those pictures?

[fol. 2835] A. I talked with Mr. Smith again.

Q. When was that?

A. The following day.

Q. Where did you talk to him?

A. In the Strand Theatre.

Q. What was said then?

Mr. McClennen: Same objection.

The Court: It may be competent.

A. I said to Mr. Smith, "You will put us to a great deal of expense. I am afraid we will have to postpone the opening of the theatre if I don't get a picture to open the theatre with", and he said that he tried all he could, that he had called Buffalo and talked with Elmer Lux four times that night, but he could not get any satisfaction, and that the pictures were withdrawn.

Q. You did not receive any prints of the pictures?

A. No, sir.

Q. That is, the two you are referring to?

A. These two pictures.

Q. Which two?

A. These two pictures, "Hurry, Charlie, Hurry", and "They Meet Again".

Q. Did you receive prints of and play the other three pictures that are named in this Exhibit 819?

A. Played "They Met in Argentina," "Reluctant [fol. 2836] Dragon", "Tom, Dick and Harry".

The Court: Is that all except the two, is it?

The Witness: All except the two.

Q. On the dates that appear on this tabulation marked as Exhibit 816 for identification?

A. Yes, sir.

Q. With reference to your tabulation marked Exhibit 816 for identification, you have in your summary there one major first-run picture. Which one was that?

A. That was "Blonde from Singapore", from Columbia.

Q. You have noted one second-run picture. Which one was that?

A. That was "Reluctant Dragon."

Q. You have one third-run picture. Which was that?

A. That was, "They Met in Argentina."

Q. Those were all RKO pictures?

A. Those were all the RKO pictures on that particular group of contracts.

Q. Yes. Then you have one travel picture listed. Which was that?

A. "Jungle Cavalcade."

Q. And the two reissues. What were their titles?

A. "Flying Down to Rio" was one. I can't seem to find the other one there. I think it was, "They Met in Argentina." I am not positive.

[fol. 2837] Q. And the foreign picture?

A. The foreign picture was "Housemaster."

Q. Did the theatre earn a profit during any of the period that is covered there?

A. No, sir.

Q. Do you know what the reason for that was?

Mr. McClennen: That is objected to.

The Court: I will let him state. You may answer.

A. Failure to get pictures commensurate with the desirability of the theatre.

Mr. McClennen: I ask to have that stricken out.

The Court: Strike out the latter part of the answer. Failure to make a profit you claim was due to the type of pictures you played, is that the answer?

The Witness: Failure to get major product.

The Court: You played what you got. It was a question of the product itself, you claim, was responsible for the loss?

The Witness: Inferior.

Q. What admission prices did you charge at the Empire during the period of your operation there—I mean at the Strand?

A. Our price range was from 28 to 35, and when the stage shows were there we charged 55 cents.

[fol. 2838] Mr. McClennen: Mr. Wright, you are wandering back and forth, and I want to see the witness and the Judge.

Q. That is, 28 cents was your lowest evening adult admission price?

A. Yes, sir.

Mr. Wright: I will offer in evidence these exhibits 817 and 816.

Mr. McClennen: Those are objected to, if your Honor please. They are not original papers and they are not summaries of anything that is in evidence, and they are not such that we could possibly check their accuracy. I urge that they be not received.

The Court: I am quite sure they are not competent, a memorandum made by the witness. The witness testified to the facts, but it seems to me you better go over them and save inquiry, which Counsel can do as to each of these set forth in these proposed exhibits. I think you ought to go over them with Counsel and see if they can be agreed upon.

Mr. McClennen: If your Honor please, we have nothing to go over. There is nothing we can check them [fol. 2839] by.

The Court: It will necessitate Counsel inquiring into it, that is all.

Mr. Wright: If the Court please, of course, in so far as what played the Empire is concerned, I assume that the defendants have a record of the pictures they showed and the admission prices at which they played them, and the dates they were played, which is all this purports to set forth, and if they haven't it is easily subject to check in newspaper ads, which carried the attractions and such prices as are here listed. In so far as the tabulation prepared by Mr. Wallace with reference to what was played in the Strand is concerned, the play dates and time are also subject to a very simple verification in the newspapers.

The Court: The memorandum itself is not the best evidence.

Mr. Wright: I would suppose that if we were put to the best evidence rule we would subpoena, first, all the records of the Schine Company with reference to these facts and all of the——

[fol. 2840] The Court: The witness made this memorandum. I suppose he has knowledge of the fact.

Mr. Wright: Yes, and I could take him down over each picture and ask him did such-and-such a picture play on such-and-such a date. If you want to do that, we can do it.

Mr. McClennen: What I don't want to do is to have a paper go in that I have no means of checking. That refers to the plays of the witness. There is nothing by which we could check, and I do not deem that it is the province of plaintiff's counsel to direct us to search the newspapers of Syracuse to see whether that is the state of facts.

As to the other list, as to what was played at the Schine Theatre or the RKO Theatre, it is absolutely hearsay as it comes from this witness. He has not testified that he was at the Empire Theatre on these various dates. Of course, we can find out by looking back at our records, but not here in Buffalo, anything we played on the different dates in the Empire Theatre, but that would not make this admissible.

[fol. 2841] The Court: I was trying to obviate extensive examination. Objection sustained as to both of them.

By Mr. Wright:

Q. Mr. Wallace, do you know what picture you played at the Strand Theatre in Syracuse from September 20, 1941, to September 24th—through September 23rd?

A. "Jungle Cavalcade" and "Flying Down to Rio."

Q. What did you play for the next period?

A. From September 24th to September 27th we played "Bowery Blitzkrieg" and "Caught In The Act."

Q. What did you play then?

A. "Father Steps Out" and "Gentleman from Dixie."

Q. Name the periods each time.

A. That was from September 27th to October 1st.

Q. Then what did you play?

A. October 1st to October 4th we played "King of the Zombies" and "Invisible Guest."

Q. Then what?

A. October 4th to October 8th we played "Let's Go Collegiate" and "Gangs, Incorporated."

Q. Then what did you play?

A. October 8th to 11th we played "City of Missing Girls" and "George Takes The Air."

Q. Then what did you play?

A. From October 11th to October 15th we played "Con-

[fol. 2842] voy" and "Regular Fellows."

Q. Then what did you play?

A. October 15th through 18th we played "Tom, Dick and Harry" and "They Met In Argentina."

Q. Then what?

A. From October 18th to October 22nd we played "Reluctant Dragon" and "Down Mexico Way."

Q. Then what did you play?

A. October 22nd to October 25th we played "Palooka" and "Army Girl."

Q. Then what?

A. October 25th to October 29th, "Housemaster" and "Little Miss Molly."

Q. Then what?

A. November 1st—let me check this—from October 29th to November 1st we played "Man of Conquest" and "Secrets of a Model."

Q. Then what did you play?

A. Then "Secrets of a Model" was held over from November 1st through November 7th.

Q. Was anything played with it during that period?

A. No. On November 8th the theatre was closed. On November 20th through the 24th we played "Spooks Run Wild," and a stage show.

Q. Was the theatre closed from the 8th to the 20th?

[fol. 2843] A. Yes, sir.

Q. Why?

Mr. McClennen: That is objected to.

The Court: Overruled.

A. Failure to obtain suitable pictures to run in the theatre.

Q. Then what did you play beginning on the 20th?

A. November 20th we played a stage show. I think it was the McFarland show, and a picture called "Spooks Run Wild."

Q. That was for one day or how long?

A. That was from November 20th through November 24th, four days.

Q. Then what did you play?

A. From November 24th to November 28th we played "Sierra Sue" and "Doctors Don't Tell."

Q. You mean beginning on the 25th, or was there an overlap?

A. No, November 20th, 21st, 22nd, 23rd—beginning on the 24th.

Q. Then the prior picture you read you had on the 23rd?

A. 20th, 21st, 22nd and 23rd, four days.

Q. What did you play beginning on the 24th?

A. "Sierra Sue" and "Doctors Don't Tell", we played the 24th, 25th, 26th and 27th.

Q. Then what did you play?

A. On November 28th through November 30th we played [fol. 2844] "Sergeant Mulligan" and "Hurricane Smith."

Q. Then what?

A. December 1st through December 4th we played "Citadel of Crime."

Q. Then what?

A. December 5th through——

Q. December 25th or 5th?

A. December 5th through 7th we played "Mountain Moonlight."

Q. Then what?

A. December 8th, 9th, 10th and 11th the theatre was closed.

Q. Why?

Mr. McClennen: Same objection.

The Court: There is nothing to show what effort he made to obtain pictures. Failure does not mean much unless he shows what he did to cause the failure. Objection overruled. I will let him answer.

Q. You may answer.

A. For the reason we did not have pictures of sufficient box-office value to justify keeping the theatre open.

Q. When did you reopen?

A. On December 12th, and December 12th, 13th and 14th we played "Poison Pen" and the theatre was then closed December 15th, 16th, 17th and 18th. On December 19th——

Q. Why was it closed during that period?

[fol. 2845] Mr. McClennen: Same objection.

The Court: Overruled.

A. For the reason we did not have sufficient product.

Q. Then what did you play?

A. On December 19th, 20th and 21st we had two or three single reels from Columbia.

Q. No feature there?

A. No feature.

Q. They were what, short subjects?

A. Short subjects.

Q. Then what did you play?

A. Then December 22nd, 23rd and 24th the theatre was closed.

Q. Why?

Mr. McClennen: Same objection.

The Court: Overruled.

A. Did not have sufficient product, feature product.

Q. Then what did you play?

A. December 25th to the 28th we played "Tuxedo Junction" and December 29t-, 30th and 31st, those three days, the theatre was closed.

Q. Why was that?

Mr. McClennen: Same objection.

The Court: Same ruling.

A. Failure to get sufficient feature product. On January 1st through January 6th we played "Blonde from Singa-

[fol. 2846] pore."

Q. Then what?

A. January 7th and 8th the theatre was closed.

Q. Why?

Mr. McClennen: Same objection.

The Court: Overruled.

A. Failure to have sufficient feature product.

Q. Then what did you play?

A. On January 9th, 10th and 11th we played "Dangerous Lady."

Q. Then what?

A. Then on January 16th, 17th and 18th we played "Riot Squad", and on January 22nd, 23rd, 24th and 25th we played "Borrowed Hero."

All the intervening dates between those periods of January 1st and 6th that I did not mention are periods when the theatre was closed, and on January 26th the theatre finally closed.

Mr. McClennen: I shall ask to have a short recess.

The Court: Yes.

(Short recess.)

[fol. 2847] Mr. Wright: If the Court please, we have witnesses here, one from Lexington and we have another from below New York and two more from Salisbury, Maryland. We dislike very much to hold any of them over the week-end, and they are anxious to get back. I suggested to Mr. McClennen that perhaps we could withdraw Mr. Wallace at the end of his direct examination and have him come back later on for cross when we get through with these other witnesses. However, that was not agreeable to him, and I submit it to your Honor.

The Court: You say it was not agreeable to him?

Mr. Wright: That is what I understood.

Mr. McClennen: For this reason, if your Honor please, with these very many places we have been getting information as to which one to expect, and I prepared until a late hour last night on this place for this witness, I had in mind unconfused by other places this testimony. I have not prepared at all for these other witnesses, because beyond the preliminary preparation on all the case, but with particular [fol. 2848] regard to these other witnesses, it is not possible to prepare properly to cross-examine three of these witnesses from other places, while this evidence is the matter that is now held in mind. I think in other cases where we could deal with the matter there has been no objection made by me, but here I have purposely refrained from going into the details of this case until the others before were out. I have now gone into it, and I shall have no time properly to prepare for three other places and at the same time carry all of this material over until Monday for the cross-examination of this witness.

The Court: We cannot accomplish very much today, it is very true. Can you prepare on these cases sufficiently tonight so that you can go on with them tomorrow?

Mr. McClennen: I do not believe that it is going to be possible to conclude with Mr. Wallace on cross.

The Court: I meant, to conclude as far as we can go today and then go on with them tomorrow when you will have time this evening.

Mr. McClennen: I have felt it my duty to the Court to [fol. 2849] prepare in such a way as to put in expeditiously what I find ought to be put in. I cannot do that if these other witnesses are put on, and if I may prepare as I go along, why, I can do it, but I cannot prepare properly to abbreviate the cross-examination in this way.

The Court: I would think we ought to be able to conclude with the witnesses tomorrow, besides Mr. Wallace.

Mr. Wright: I would hope so. These witnesses were all included in the list furnished to Mr. McClennen earlier in the week.

Mr. McClennen: Of course, they were, but I have just explained.

The Court: I think we ought to proceed, and shorten the examination as much as we can.

Mr. McClennen: I have made inquiry, and I think we shall be able to determine what we played at the Empire Theatre from September 1, to February 1, 1941, to February, 1942, by consulting our records, so that it will not be necessary to go into detail as to that place.

Mr. Wright: It also covers admission prices.

[fol. 2850] Mr. McClennen: I think we can cover admission prices also.

The Court: It will save much time if we can do that.

Mr. Wright: In that case, you may cross-examine.

The Court: Proceed with the cross-examination.

Cross-examination.

By Mr. McClennen:

Q. Mr. Wallace, when were you in Canandaigua, New York last?

A. In August, 1944.

Q. When prior to May 19th, 1942, were you there?

A. Well, a number of times prior to May, 1942.

Q. What did you observe the last time before May, 1942, as to the number of theatres in Canandaigua?

A. Prior to May, 1942?

Q. Prior to May, 1942, the last time.

A. There was one theatre.

Q. When prior to May 19th, 1942, were you last there?

A. Several times in 1942, but specifically June 19th, 1941.

Q. And did you at that time see the Lake Theatre in Canandaigua?

A. In 1941? No, sir.

Q. Do you know now where the Lake Theatre in Canandaigua is?

A. I do.

[fol. 2851] Q. And did you see that spot in June, 1941?

A. I did.

Q. And was the Lake Theatre upon it at that time?

A. I couldn't say.

Q. Well, why did you say that you didn't see the Lake Theatre in June, 1941?

A. I didn't see the Lake Theatre in 1941.

Q. Did you see the spot where the Lake Theatre is?

A. I saw the spot where it is, a number of times.

Q. In 1941, after April?

A. I couldn't say to that, but I saw it many times previous and a number of times after 1943.

Q. And do you not know whether the Lake Theatre was fully built and opened before June, 1941, when you spoke of being there, is that the fact?

A. I do not know if it was fully built and opened in June, 1941, no, sir.

Q. That is so far as your recollection helps. It may have been built and opened before that?

A. It may have been.

Q. Did you see the Lake Theatre in the process of construction at all?

A. No, sir.

Q. Was your observation of the spot where the Lake Theatre was constructed such that you say from your recollec-
[fol. 2852] tion that it was not begun its construction in the latter part of 1940?

A. Will you repeat the hypothesis of that remark?

The Court: Read it.

The Witness: From my recollection I don't know when the construction of that theatre begun.

(Preceding question read.)

Q. Did you mean to leave your testimony in direct-examination so as to convey the impression that the Schine interests had not built a theatre in Canandaigua?

A. Oh, no, sir.

The Court: You testified to one as being near the property concerning which he was talking of purchasing; now, is this other Lake Theatre a separate theatre from that?

Q. How far away is the Lake Theatre from the Flannigan lot which you mentioned?

A. It is on a different side of the street. It is on the west side of the street, and I should say it is a half a block down.

Q. I don't know just what the length of the blocks in Canandaigua may be; is it within 100 feet or 200 feet of the Flannigan lot?

A. I couldn't say, I wouldn't guess at that.

Q. Is your recollection of the locality such that you can [fol. 2853] give us no better than a guess on the length?

A. I said I wouldn't guess at that.

Q. Yes, and I ask you whether your recollection of the locality is such that you can't do any better than guess on it?

A. No, I am not guessing.

Q. You can't say whether, in your recollection, it is within 100 feet or 200 feet of where the Flannigan lot is?

A. I can place the location of the Lake Theatre. I can place the location of the Flannigan Block.

The Court: The Flannigan Block is on the east side of the street.

The Witness: The Flannigan Block is on the east side of the Street, and the Lake Theatre is on the west side of the street up near where the Schine theatre is.

The Court: You were talking about buying a location near the Schine Theatre.

The Witness: Almost abutting it.

Q. The Lake Theatre was not constructed on the Jenkins lot, was it?

A. No, sir.

Q. And still can you give us no estimate whatever of the distance of the Lake Theatre from the Flannigan lot?

[fol. 2854] A. From the Flannigan lot?

Q. Yes.

A. I wouldn't want to guess at it.

Q. Had you informed counsel for the plaintiff that you were aware that Mr. Schine had built a second theatre in Canandaigua?

A. At what time?

Q. At any time?

A. I don't think I did.

Mr. Wright: If the Court please, there is no dispute about the fact that a second theatre was built. The interrogatories so inform us.

The Court: He is asking him for his knowledge about it. Proceed.

Q. I am seeking to show whether or not there was the intention to convey the idea that there had been an abandonment by the Schines of the idea of building a theatre in Canandaigua.

Mr. Wright: There was no more——

The Court: There is nothing from which such an intention can be drawn, that it was abandoned at that time. I will withdraw that remark.

Mr. Wright: The only intention as far as we are concerned, the only claim made, the only testimony that was [fol. 2855] offered was simply to show that Schine did not build a theatre on that particular property where the sign was at that time. They did build another theatre two or three years later in this other location which I take to be the Lake.

Mr. McClennen: Two or three years later than what?

Mr. Wright: I beg your pardon?

Mr. McClennen: Two or three years later than what?

The Court: Subsequent to May, 1942?

Mr. Kallis: May, 1938.

The Court: Not the second theatre. There was no second theatre there in 1938.

Mr. Kallis: The second theatre was constructed two years and nine months after the Flannigan——

Mr. McClennen: You mean the completion of the theatre was two years and nine months after May, 1938?

Mr. Kallis: That is right. That is my estimate of it, and I think that is correct.

Mr. Wright: Let us see what the interrogatory says on that. It ought to be easy enough to settle right now.

The Court: Don't waste much time. Proceed on another line.

[fol. 2856] Mr. Wright: The answer to the interrogatory 17-A, as I recall, says under the Lake Theatre, Canandaigua, under the column "Remarks," a new construction, completed April, 1941. I take it to be that is the date on which the theatre was completed. The lot was acquired—I will read the whole answer under the Town of Canandaigua "Name of Theatre, Lake; any interest, owner; nature of interest, 100 per cent; leased November, 1939, fee, August, 1940; other interest, none; date disposed of, none; seating capacity, 374; closed period, blank; remarks re closed period, new

construction completed April, 1941; owned or leased, leased, November, 1939; fee acquired, 1940."

The Court: There certainly was one theatre besides the Lake in 1939-40 in that town.

Mr. McClennen: Yes, I am simply submitting this testimony——

The Court: Who owns the other one?

Mr. McClennen: The Schines.

The Court: That is right.

Mr. McClennen: I am meeting any suggestion that there was any abandonment at any time of the project.

The Court: Pick up the date and go ahead.

[fol. 2857] Mr. McClennen: —of putting up a theatre there.

Mr. Wright: No such suggestion has been made.

Mr. McClennen: Well, there wasn't anything said about it in the course of examination of what had happened in Canandaigua. Now, to answer your Honor's question, the Play House was acquired in Canandaigua by the Schine interests in October, 1924 and was still there throughout the period that we have been discussing, and this was a second theatre.

The Court: Where was the first theatre located?

By Mr. McClennen:

Q. Where was the first theatre located, the Play House?

A. On a westerly direction on a side street.

The Court: You testified to that once before in reference to the lands, you were seeking to purchase.

The Witness: Yes, sir.

By Mr. McClennen:

Q. Now, did the sign that you saw on the Flannigan lot contain any signature?

A. No, sir.

Q. Or any, I mean, even in print?

A. Not even in print.

[fol. 2858] Q. Do you know how many seats the Lake Theatre contained?

A. I do not.

Q. Do you know anything about its interior?

A. I do not.

Q. As to type of construction or equipment?

A. No, sir.

Q. Syracuse, New York, from a theatre operating standpoint, has been known to you for 15 or more years?

A. I should say so, yes, sir.

Q. In 1940 and in 1939 there were some [illegible] theatres in Syracuse, moving picture theatres, were there?

A. I don't think there were that many.

Q. How many do you think there were?

A. I think there were about 25.

Q. About 25, and how many of those were downtown?

A. Do you wish me to enumerate the theatres that were downtown?

Q. How many, I said?

A. Six.

Q. Six downtown. How many suburban theatres were there in Syracuse, in 1939?

A. About 20.

Q. Were those collected in one suburb or more, or were they distributed through what could be called a number of separate suburbs?

[fol. 2859] A. Well, I don't think that there is any geographical distribution other than that they were scattered around in certain places in a heterogeneous manner so that if a fellow thought that business could be done at a certain spot, that is where the theatre was located. I don't think you could set a certain geographical plan or scheme out to say they were set in certain suburbs.

Q. The day and date playing, when conducted by theatres, owned by different individuals is usually confined to suburban areas, is it not?

A. The day and date?

Q. Yes.

A. You must make a distinction there. A suburban theatre has a second-run, and a suburban theatre has a third-run, and then there is a subsequent-run. If you mean on a subsequent-run, they confine them to day and date playing, I say "Yes." Where you ask me a theatre like the Riviera, which had a well established run, and the Cameo, which had an established run, they are neighborhood theatres, and have always been considered neighborhood theatres, they didn't have a contiguous time and date run with other subsequent-runs.

Q. It isn't usual with theatre operations to have a day and date play among theatres that are inter-competitive in [fol. 2860] their particular areas, is it?

A. That I am not—I can answer that. I know of situations where they do, and I know of situations where they don't.

Q. You do not know of a regular effort of exhibitors not to play day and date with other exhibitors' theatres that are directly competitive with them; you do not know of that?

A. Well, as I said before sometimes they do and sometimes not. I could cite you instances where a day and date booking is used and they are competitive situations to each other, in a sub-run in a neighborhood section.

Q. Among theatres that are in different ownerships?

A. Yes, there is no unity of ownership between these two particular——

Q. Well, would you cite me where these are that you speak of?

A. For example, the Acme Theatre in Syracuse and the Turnhall Theatre in Syracuse, they both cater to trade on the north side, and they both strive to play pictures day and date.

Q. How far apart are they from each other?

A. Well, there are in the same neighborhood, and probably 15 or 18 blocks apart, but they are in a neighborhood called the North Side.

Q. 15 or 18 blocks apart?

[fol. 2861] A. Yes, sir.

Q. And that is a matter of nearly a mile?

A. Well, I should judge so, yes.

Q. Now, you are aware of the fact, are you not, that in theatre operation it is recognized that suburban runs; suburban houses and downtown houses are competitive?

A. I am aware that——

Q. No, would you just answer whether you are aware of that?

A. I can't answer that "Yes" or "No."

Q. That is, you are not aware of that?

A. I didn't say that.

Q. Well, then——

A. I said I am aware in view of certain distinctions and under certain conditions downtown houses are competitive to neighborhood houses, but as a general rule downtown

houses are not considered competitive situations with neighborhood houses.

Q. One of the regular conceptions of exhibitors is in the interest of the downtown houses that there shall be sufficient clearance over the neighborhood houses, so that the workers downtown, the shoppers downtown, and so forth, will not postpone going to the downtown houses because they can go to the neighborhood house, isn't that so?

[fol. 2862] Mr. Wright: If the Court please, I submit that is meaningless argument, which, even if it could be answered by some competent witness, has no relevancy to anything this witness testified on direct.

The Court: Overruled.

(Preceding question read.)

The Court: Of course, if there was a clearance, there wouldn't be an opportunity of going at the same time.

Mr. McClennen: I believe the answer to this to be "Yes," and as your Honor has indicated——

The Court: That they are competitive.

Mr. McClennen: That they are competitive in that sense.

The Court: I thought that the neighborhood theatres had second-run and the downtown theatres first-run.

Mr. McClennen: And with a clearance between them and for the reason I have inserted in the question.

The Court: I thought your argument was they were competitive in the sense they were showing at the same time.

Mr. McClennen: No, I spoke of clearance in the question.

[fol. 2863] The Court: You spoke of competition, too. Well, can you answer the question?

The Witness: Why, your Honor, I have always considered clearance and protection as being two things that are coupled together. If he would form the question so that clearance and protection could be put in that causal clause he speaks of, then I believe I would be competent to answer that question.

[fol. 2864] Q. With that amendment to my question is your answer yes?

A. My answer would be that the clearance protection granted the first-runs is for the specific purpose of diverting the bulk of the business to the first-runs, that only first-runs in any given situation are competitive to each other, and it is a recognized fact in this industry that neighborhood

houses take the leavings. I hope that answers your question.

Q. When you operate a first-run house that is the reason that you seek protection?

A. That is right. Of course, protection against who or what kind of protection? It is a theory of protection. It seems to work protection against the small theatre, but my philosophy in the matter is that it should be protection the other way around.

Q. Protection in your favor?

A. I say my philosophy in the matter is that the large first-runs, as a rule, don't need the fiction of protection written into their contract. They are sufficiently powerful to have and use their own methods of protection, that the average film contract, in contra-distinction to the way you suggested the question, the protection should be written for the little fellow, the sub-runs that you speak about, that you state are so-called competitors. And in actuality they [fol. 2865] are not.

Q. That is, that the protection should be given to the neighborhood house over the first-run house downtown?

A. There should be a certain amount of protection against undue long runs or extreme length of availability from one run to the other.

Q. That is, that the neighborhood house should have protection against the down-town houses?

A. No.

Mr. Wright: This is a discussion that I don't see has anything to do with the issues.

The Court: I think you better proceed to something else, Mr. McClennen.

Mr. McClennen: If I may state my purpose, it is to show that with 25 theatres in Syracuse the prospect of a new theatre coming in and having anything except a very much deferred run was practically nil.

The Court: It seems to me you have covered this line of inquiry for that purpose.

Mr. McClennen: That is all I desire to do, if I brought that to your Honor's attention.

The Witness: May I——

The Court: Just answer the questions and we will save a lot of time.

[fol. 2866] By Mr. McClennen:

Q. The Eckel, the Keith, the Paramount and the Palace were naturally first-run houses, were they not?

A. No, sir.

Q. Had they ever been operated in any other way?

A. Palace Theatre had always been operated as a sub-run theatre.

Q. Had any of the other three been operated in any other way than as a first-run?

A. No, sir.

Q. The Loew's was always a first-run?

A. Yes, sir.

Q. And therefore there were four first-run houses and some subsequent down-town?

A. No, there were five first-run houses and some subsequents.

Q. Which were the five first-run houses?

A. You neglected to include the Strand Theatre in Syracuse, which was a well-established and long-established first-run house.

Q. So that there were five?

A. Five.

Q. First-run houses, before you got to the Empire Theatre?

A. The history behind the Empire was——

Q. I did not ask you the history.

A. I beg your pardon. I did not get your question.

[fol. 2867] Q. There were five first-run houses before the Empire Theatre?

A. Yes, sir.

The Court: You mean before the Empire, as a run, or before it was started?

Mr. McClennen: I mean that there were five theatres to be served as first-run theatres before there could be any service to the Empire Theatre.

The Court: Before there could be any service to the Empire Theatre?

Mr. Wright: During what period?

The Court: What do you mean by that "before there could be any service"?

Mr. McClennen: Before there could be any service of pictures to the Empire.

The Court: Five first-runs—yes—you say before the Empire. Of course, the Empire was not a first-run then. You mean subsequently it became a first-run. Was the Empire ever a first-run?

Mr. McClennen: The Empire, we say, was never a first-run.

By Mr. McClennen:

Q. Now, when you got your lease of the Strand in September, 1941, it was 12 days after the RKO-Schine operation [fol. 2868] had ended, was it not?

A. Twelve days after the Schine operation had ended we got the lease on the Strand? Is that what you said?

Q. Yes.

A. No, sir.

Q. When did the Schine-RKO operation of the Strand end?

A. To the best of my recollection it ended in June 22, 1941, and we negotiated and signed a lease on September 5, 1941. That would be longer than a twelve-day period.

Q. You were aware that the Strand lease to the RKO-Schine operation ended August 31, 1941?

A. I was not aware of that.

Q. So that in the course of your negotiations you did not discover that the lease was expiring at about that time?

A. I never saw any lease of the Schine people.

Q. And you never saw anything to indicate that RKO-Schine had lost their control of the Strand until you got your own lease?

A. I did not see anything that would indicate that Schine had lost control at any time. I assume that they lost control of the lease June 22, 1941. We negotiated a lease and signed it on September 5, 1941. That is as much as I know about that transaction.

[fol. 2869] Q. Why did you assume that their lease had ended in June, 1941?

A. From the physical condition of the theatre, the marquee.

Q. Did the marquee indicate that the lease had expired?

A. It said "This theatre is closed." It did not indicate that the lease had expired, but inferentially I could see the theatre was in a neglected condition. I assumed it was abandoned.

Q. And from that you assumed that the lease had expired, did you?

A. I did not assume that the lease had expired. I felt that the lease had expired. I had nothing definite. I did not have any paper that would indicate to me that this certain lease had expired as of a certain date. I thought all along Schine's lease had expired as of June 22, 1941.

Q. You never inquired?

A. I had——

Q. You never inquired?

A. I had no reason to inquire about the back history——.

Q. I did not ask you the reason. I say, you never inquired?

A. No, I never inquired.

Q. How soon after August 31, 1941, did the "Empress" reopen after the summer closing?

A. There is no such theatre as the Empress.

[fols. 2870-2872] Q. The Empire. I beg your pardon.

A. The Empire Theatre opened, to the best of my recollection, September 12, 1941.

Q. That is, the Empire opened twelve days after what now appears as the actual end of the Schine-RKO lease?

A. I could not state that.

Q. It did open on September 12th?

A. It opened on September 12th.

Q. 1941?

A. That lease may have expired six months prior.

Q. Up to that time, the summer of 1941, the four RKO-Schine theatres were operating right along for years?

A. What do you mean by the period of "for years"?

Q. I mean the period you referred to when you said that the four theatres continued to operate full time. What period did you mean?

A. The Keith Theatre, to the best of my knowledge, operated for fifteen years continuously. The Eckel Theatre, with the exception of the time there was a fire, operated continuously. The Paramount Theatre operated continuously. The Strand Theatre operated continuously up to a certain period, and then operated intermittently.

The Court: I think we will have to suspend at this time.

(Whereupon a recess was taken to tomorrow, Friday, October 13, 1944, at 10 A. M.)

[fol. 2873] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223

UNITED STATES OF AMERICA

vs.

SCHINE CHAIN THEATRES, INC., et al., Defendants

Continuation of trial before Honorable John Knight, United States District Judge for the Western District of New York, October 12th, 1944, 10 o'clock A. M.

Appearances:

Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Special Assistants to the Attorney General, and Milton Kallis, Esq., Special Attorney, in behalf of the United States.

Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homans, Esq., and Howard M. Antevil, Esq., appearing for the Defendants.

[fol. 2874] Proceedings

Mr. Wright: If the Court please, I understand Mr. McClennen has withdrawn his objection to our withdrawing Mr. Wallace and proceeding with Mr. Schwartz, of Lexington, and witnesses who are here from Maryland and Delaware, but I understand he is not prepared to proceed with the witness Boumansour, who is here from Malone, New York. The witness Schwartz hasn't yet reached the court-room. I suggest that we proceed with the cross-examination of Mr. Wallace until Mr. Schwartz arrives, and I understand that is agreeable to counsel.

The Court: All right.

Mr. McClennen: My New York friends desire your Honor's confirmation that we stop at 4 o'clock.

The Court: That is up to you. It has nothing to do with me.

[fol. 2875] HUBERT P. WALLACE resumed the stand by and on behalf of the Plaintiff, and testified further as follows:

Cross-examination (continued).

By Mr. McClennen:

Q. I was asking you to fix as nearly as you could the times when the Strand operated continuously under the R. K. O.-Schine operation.

The Court: When it began to operate continuously, from what time?

Mr. McClennen: No, it has appeared clearly enough in the older days it was a continuous operation, and the witness had carried that to an indefinite time when he said it became an intermittent operation.

Q. Would you fix that time between the continuous and intermittent?

A. Some time in 1939.

Q. 1939?

A. Yes, sir.

Q. And what was your personal observation of the operation of that theatre from 1939 to 1941? I don't mean your conclusion from it, but how much did you see of the operation [fol. 2876] between 1939 and 1941?

A. What operation do you refer to, do you mean the physical operation?

Q. The Strand.

A. Do you mean the physical operation of the theatre?

Q. I mean so you knew by eyesight whether the operation was continous or intermittent.

A. I knew by eyesight.

Q. That is, you were in Syracuse frequently at that period?

A. Yes, sir.

Q. And at times when you were there in the period from 1939 to 1941, you saw that the Strand was open for business?

A. Yes, sir.

Q. And at times you saw that it was not open for business?

A. Yes, sir.

Q. How many times did you see when it was not open for business? Did you see it in that period from 1939 to 1941?

A. Well, I know definitely one time I had occasion to go

down and look for a sign painter that worked for the Strand that also worked for me. I know one time particularly the theatre was closed.

Q. When was that?

A. That was in the spring of 1940, I believe.

[fol. 2877] Q. A week day, of course, not a Sunday?

A. Not a Sunday, no, sir.

Q. And time of day?

A. It was late in the afternoon.

Q. And now apart from that one incident, do you know from personal observation of any other time when the Strand wasn't open in the two years from 1939 to 1941?

A. Well, I do know that.

Q. I say, you observed it?

A. I do know.

Q. How many times did you observe it closed?

A. I should say four or five times.

Q. Four or five times in the two years?

A. Yes, sir.

Q. And were some of those in the summertime?

A. Yes, sir.

Q. Were all of them in the daytime as distinguished from evening?

A. Several were in the daytime and several were in the evening.

Q. The two severals amounting to about five in all?

A. Approximately.

Q. Now, apart from that, or, have you now stated your personal observation of the times when the Strand was closed during the two years from 1939 to 1941?

[fol. 2878] A. I have.

Q. You talked about its rundown condition as you observed it in June of 1941. Had you noticed that before at any time?

A. No, sir.

Q. And describe that rundown condition that you noticed in June of 1941.

A. I said the front of the theatre was in a rundown condition. By that I mean it looked to me and gave me the impression that the theatre was abandoned because there had been an attraction which was advertised that had played some days previously, and that is something that doesn't occur in the theatre business.

Q. What other indications of a rundown condition did you see?

A. The brass doors had not been polished for some length of time. The windows were very dirty, electric light bulbs were,—a great many of them were broken and out. The one glass in the box office, I believe, was broken, and the general appearance gave me that impression.

Q. That is, it had become an uninviting looking theatre?

A. From the outside.

Q. From the outside?

A. Yes, sir.

Q. Did you go inside?

[fol. 2879] A. Not at that time.

Mr. McClennen: I am advised, if your Honor please, that Mr. Schwartz has arrived. I will suspend if agreeable to your Honor.

The Court: All right.

Harry Schwartz a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. Schwartz?

A. Lexington, Kentucky.

Q. What is your occupation?

A. At present I am a road show operator. I have a hygiene picture that I book around the country.

Q. How long have you been so employed?

A. A year and a half.

Q. You were formerly the owner and operator of the Opera House Theatre at Lexington, Kentucky?

A. Yes, sir.

[fol. 2880] The Court: That is the name, Opera House Theatre.

Q. Opera House. That was during what period?

A. Between 1931 and 1939.

Q. And then during part of that period you also managed the theatre?

A. Yes, sir, from 1935 until 1939.

Q. Calling your attention to the year of 1935 what other theatres were operating there at Lexington?

A. The Kentucky, Ben Ali, the Strand and the State.

Q. Who operated those?

A. And the Ada Mead.

Q. Who operated the first four theatres you named?

A. The Phoenix Amusement Company of Lexington, Kentucky.

The Court: When you speak of the first four, among them was the Schine?

The Witness: No, at that time it was the Phoenix Amusement Company of Lexington who operated it.

Q. Do you know who the people were who managed them for that Company, or were associated with them?

A. Yes, the names were Miss Hannabelle Ward and John B. Ward.

[fol. 2881] Q. Then who was operating the Ada Meade?

A. Mr. Switow.

Q. Which of those that you named were first-run theatres?

A. The Kentucky and Ben Ali.

Q. Do you recall about what the admission prices were that were charged there?

A. 40-cent admission at night and 25 matinee.

Q. The Strand, what policy was that playing?

A. Strand was running second-run policy at a 15-cent matinee and 25 at night.

Q. And the State?

A. State was running at 10 cents all the time, the Ada Meade was ten cents.

Q. Ada Meade also?

A. Yes, sir.

Q. Your theatre, what were you charging?

A. 1935 I charged 10 matinee and 15 at night.

Q. During that year did you have any first-run pictures at your Opera House?

The Court: Are you speaking of 1935?

Mr. Wright: Yes.

A. I had the opportunity of acquiring United Artists first-run for their 1934-1935 group.

Q. 1934-1935 product?

A. Yes.

[fol. 2882] Q. You got it and played it in 1935?

A. That is right, early part of 1935.

Q. Were your prices the same when you played United Artists?

A. No, I raised my admission price to 25 cents at night.

Q. When you played those pictures?

A. When I played first-run United Artists pictures.

Q. As to the other major product you played, which theatres did you follow?

A. I followed the Ben Ali, Kentucky, Strand—just those three at that time.

Q. And the 10-cent theatres followed you?

A. Yes, they did.

Q. Then, calling your attention to the year 1936, do you recall when the Phoenix Amusement Theatres were taken over by the Schine interests?

A. They were taken over about November, 1936.

The Court: The Phoenix Amusement Company controlled how many theatres?

The Witness: Four.

Q. Then, just prior to the time that take-over occurred were you then playing any first-run pictures?

A. I played United Artists first-run.

Q. You still had some of those 1934-1935 season?

A. That is right.

Q. Your admission price policy was the same as you [fol. 2883] described for 1935?

A. That is right.

The Court: Did you have a contract for the season?

The Witness: I had one season's contract of United Artists.

The Court: 1936-1937?

The Witness: Just the 1934-1935, but they were late in delivering some of the pictures, so I ran some of them in 1936.

The Court: That was run on your old contract, you mean?

The Witness: That is right.

Q. Calling your attention specifically to Metro products in the fall of 1936, do you recall what run you were playing their pictures on?

A. I played a second-run Metro contract in 1935-1936.

Q. Do you know whether it was second or third?

A. It was a second-run, 1934-1935 product.

Q. Of the prior season's product?

A. That is right, of the prior season's product.

Q. Did you also have a run of the 1935-1936 season's product?

A. I had a third run of the 1935-1936 season.

Q. What, if any, negotiations did you have with Metro with respect to the 1936-1937 season's product?

A. I was told by their manager.

Q. Just say who you talked to, and where.

A. I talked to Mr. Booth, the Metro manager, in the Cin-
[fol. 2884] cinnati territory.

Q. Where did you talk to him?

A. In my office at the Opera House.

Q. What was said with reference to the 1936-1937 season's product?

Mr. McClennen: Same objection.

The Court: Overruled.

A. He said that the first three runs had been sold to the Schine theatre interests, and that I could have fourth run.

Q. Do you remember when it was that he told you that?

A. It was in November of nineteen—I don't just remember—the later part of 1936 or early in 1937.

Q. I will call your attention to this letter which has already been identified as Exhibit 447 for identification. Does that apear to be your signature on that?

A. Yes, it is.

Q. Do you recall writing that letter on or about the date it bears?

A. Yes, I do.

Mr. Wright: I will offer this in evidence.

Mr. McClennen: The general objection.

The Court: What is that?

Mr. Wright: One of those previously identified as having come from the files of the Loew Company.

[fol. 2885] (The letter dated January 10, 1937, to M.G.M. from Mr. Schwartz was received in evidence and marked Plaintiff's Exhibit 447.)

Mr. Wright: This letter is dated January 10, 1937, addressed to M.G.M. Distributing Corporation, 1636 Central Parkway, Cincinnati, attention of Mr. E. A. Booth, Manager. "Gentlemen: As I have been an account of yours for the past four years, either as a third-run and once as a second-run, I wish to go on record as saying that I still wish to be your third-run account in Lexington. You have told me on several occasions that the Schine Amusement Company, who purchased the Phoenix Amusement Company some time in November, had all of your product, first, second and third-run. It is necessary that I have third-run product at the Opera House as my customers have been accustomed to seeing Metro product, and I intend to take steps immediately to protect my business. Therefore, I ask that you send me definite information regarding the Opera [fol. 2886] House situation with you for this season's product."

By Mr. Wright:

Q. Do you recall when the first time was that you were told by Mr. Booth that you were not going to get the third-run of Metro pictures for the 1936-1937 season?

The Court: He did not quite say that. He said he told him the first three runs had been sold to Schine. State the conversation.

Mr. Wright: I just wanted to fix the date of that, as near as I could.

The Court: You mean by the date of that letter?

Mr. Wright: Yes.

Q. Do you remember how long before you wrote that letter that was?

A. It was either in the latter part of November, 1936, or early in December that he visited Lexington and stopped in my office and told me that.

Q. I will show you this document and ask you if that appears to be your signature on there?

A. Yes, it is my signature.

Mr. Wright: I will ask to have this marked as the next Plaintiff's exhibit number. It comes from one of the files which were previously identified by the Metro representa- [fol. 2887] tive. Have you got the number of that? That was

identified in the folder marked for identification as Exhibit 607. Perhaps we better mark it was 607-A.

Mr. McClennen: Don't you think that will bother us more? Why not give it the next number?

Mr. Wright: As long as there is no question about it having been previously identified as having come from the files of the company.

Mr. McClennen: We accept your statement that that came from the files of the company.

Mr. Wright: Then give it the next Plaintiff's exhibit number, and we offer it in evidence.

(The contract between Mr. Schwartz and Metro for fourth-run 1936-1937 product received in evidence and marked Plaintiff's Exhibit 821.)

By Mr. Wright:

Q. Do you recognize this Exhibit 821 as the contract you finally made with Metro for the fourth-run for their 1936-1937 product?

A. Yes, sir.

Mr. McClennen: You stated the date, did you?

Q. Was that application signed by you on or about the date it bears there?

A. February 13, 1937, yes, sir.

Q. Then you played that product, did you, on the fourth-
[fol. 2888] run, in accordance with the contract?

A. Yes, I did.

Q. What theatres played the first three runs ahead of you, do you recall?

A. Either the Kentucky or Ben Ali first-run, and the Strand second-run, and the State third-run.

Q. In the fall of 1936 what admission prices were these theatres charging?

A. The two first-run theatres were charging 40 cents at night and 25 for the matinee, and the second-run theatre, the Strand, was charging 25 cents at night, 15 cents matinee, and the State was charging 10 cents matinee and 15 cents at night.

Q. You say you were then following the State as well as the other three theatres?

A. Yes, sir.

Q. Do you recall about how long those prices continued?
A. Until about June, 1937.

Mr. Wright: I will ask to have this marked with the next Plaintiff's exhibit number for identification.

(Photostatic copy of ads appearing in Lexington Herald July 9, 1937, marked as Plaintiff's Exhibit 822 for identification.)

Q. Do you recognize Exhibit 822 for identification as a [fol. 2889] photostatic copy of ads that appeared in the Lexington Herald, July 9, 1937?
A. Yes, I recall it.
Q. Does that refresh your recollection as to when there was a change in those admission prices you had previously referred to?

Mr. McClennen: That is objected to, as to when there was a change. There is no objection to the question what they were at that time.
The Court: Does it refresh your recollection as to what the charges were at that time?
The Witness Yes, sir.

Q. Are the charges there stated in the ads that appear on this Exhibit 822 for identification the ones that Schine began to charge in June, 1937?

Mr. McClennen: That is objected to. There is nothing to indicate that he began in June.
Mr. Wright: He just testified that the previous prices were in effect until June. I merely wanted to find out what the prices from June on were. I use this as a convenient point of reference.
The Court: If that refreshes his recollection, he can testify to the facts.

Q. When the change occurred in June that you have al- [fol. 2890] ready referred to, what was that change?
A. It was a lowering of the matinee price in the balcony of the first-run theatre, in the Ben Ali.
Q. Lowered from what to what?
A. 25 to 15 or 16 cents with the tax.
Q. What else?
A. Night admission price in the balcony was lowered from 40 cents to 27 cents with the tax.

Q. That was in the Ben Ali?

A. That was in the Ben Ali.

Q. How about the Strand and State?

A. The State had only one admission price always, because it only has one floor, but the Strand is a two-floor theatre, that is, lower floor and balcony. They lowered their balcony admission price in the Strand from 27 to 17 at night.

Q. How about——

A. Matinee was 16 cents all over.

[fol. 2891] Q. And the main floor of the Strand at night was——

A. 27—22 cents.

Q. Then do you know about how long those prices continued?

A. They continued all during the entire summer.

Q. Of——

A. 1937. It was the summer policy, in other words.

Q. You mean 1937 or 1938?

A. 1937.

Q. 1937, and then did they continue after that?

A. The following years?

Q. In the fall, yes, and winter.

A. No, in the fall they raised their admission prices to normal.

Q. By normal you mean what?

A. 40 cents admission in the first-run houses and 25 cents admission in the second-run houses.

Q. Then how about the State?

A. The State was 10 and 15 cents; 10 cents matinee and 15 at night.

Q. That was the third-run house?

A. Yes.

Q. Then, was there any reduction again in the year of 1937 after they were put back again in the fall?

The Court: The same year, 1937?

Q. Yes.

[fol. 2892] A. No.

Q. Was there in 1938?

A. During the summer months there was.

Q. Now, I call your attention to these three exhibits which have been previously marked,—I beg your pardon, two exhibits which have been previously marked for identification

as exhibits 209 and 259, and ask you if you wrote those letters on or about the dates they bear?

A. Yes, I wrote them.

Mr. Wright: We offer these two exhibits in evidence.

(Documents shown to Mr. McClennen.)

Mr. McClennen: This identification 209, I submit is open to further objection than the ordinary conversations which your Honor has admitted over our objection, or the letters which you have admitted over our objections.

The Court: Let me see it.

Mr. McClennen: It seems to me that its contents, which I show your Honor, indicates that it has nothing whatever to do with this case, nothing that affects us in any way and contains recitals which are mere hearsay, and do not assist in any way in this case or resolving it correctly.

The Court: Well, am I to understand you were receiving [fol. 2893] the Fox pictures at this time, the time of this communication?

The Witness: Yes.

The Court: I think it is competent along the lines of the showing here. I mean, this coupled up with some act by the Fox Company in that regard, I mean that Fox had refused to take any production——

Mr. McClennen: I speak with complete deference, if your Honor please. I urge that it would have no effect upon Schine in any way whether Fox let a customer off his contracts.

The Court: I will receive it and see what follows.

Mr. Wright: If the Court please, it isn't offered for the purpose of showing the production, it was offered for the purpose of showing that direct attention was brought home, knowledge was brought home to the Fox Company of what the admission price policy they were permitting Schine to pursue in Lexington was doing to this man's business. That is the principal purpose of the offer.

The Court: What the policy of Schine was doing?

Mr. Wright: With respect to admission prices playing a run ahead of him. I mean in their theatres, at the same [fol. 2894] price he had to charge for the later runs.

Mr. McClennen: The joker, if I may be so flippant to use that remark, in Mr. Wright's statement was that Fox was permitting Schine to pursue this policy. Fox had nothing

to do with the policy whatever, nothing to indicate that it was Schine's policy.

The Court: It shows a co-conspirator had knowledge of what another co-conspirator was doing.

Mr. McClennen: The statement, if your Honor please, was not that. The statement was that Fox was permitting this. There was no basis for such an assertion.

Mr. Wright: The minimum prices the exhibitors could charge were inserted in the contract. Mr. Schwartz' contract had a minimum price of 16 cents. Fox permitted Schine to play ahead of him at the same price, a procedure which could only have been calculated to ultimately achieve what was accomplished, and that is put an end to Mr. Schwartz' competition at the Opera House.

Mr. McClennen: The Fox Company did not permit it. There was never any contract by which Fox could require [fol. 2895] Schine to charge any more admissions than were charged. It was their province to determine what their admissions should be, so long as they did not violate the contract, and there is no contract that is in evidence, that can be put in evidence, that they violated that provision of any contract, so that this remark about Fox permitting this is just picked out of the blue by my brother, because he likes that form, but there is no evidence of it.

Mr. Wright: I would prefer, if the Court please, to argue the case after we have put in the evidence rather than now. As long as counsel has made the point, I feel at liberty to state what the position is.

Mr. McClennen: Our position is whether the argument be interlocutory or final, they ought to be based on evidence.

The Court: This goes to the request for a reduction of price on the Fox pictures to this witness.

Mr. McClennen: This is a request for reduction in prices this witness addressed to Fox. He wants relief from his contract as to prices.

The Court: Yes, in order to attain the end——

[fol. 2896] Mr. McClennen: That has nothing to do with Schine.

The Court: It appears to me it is competent not only as a notice to an alleged co-conspirator of the act of another alleged co-conspirator, but if it may appear Fox refused to make any reduction then it might have a bearing on the action in concurring with Schine.

Mr. McClennen: That is not the stated purpose of the offer. The stated purpose——

The Court: It may be one of the purposes.

Mr. Wright: That is quite right, as I understand a reduction, I think, was probably obtained. For our purpose it is immaterial whether they reduced the film rentals, or whether they didn't. We do not offer the letter for the purpose of showing what was done there. We offer the letter for the purpose of showing knowledge was brought home to Fox of the effect on his business of permitting the Schine houses to play the pictures ahead of him, at the same admission prices he was charging for the later run.

Mr. McClennen: I stated what the purpose of Mr. Wright was in confident reliance on what he said, and what he said was that it was to show Fox was permitting these lower [fol. 2897] prices. The letter contains nothing——

Mr. Wright: The letter will not show that.

Mr. McClennen: Just a moment, just a moment; I have tried not to interrupt you.

As I was saying, before the unwarranted interruption, the offer was to show that Fox was permitting these lower admission prices. That was the stated purpose. We urge that there is nothing in the letter, nothing in evidence in any way to indicate that Fox did permit the lower admission prices or that they had any control over the admission prices so long as they did not violate the contract of Fox and Schine, and there is no evidence that they did, and it is now stated, meeting your Honor's suggestion of a possible purpose, that there is no claim that they did not get these reductions in contract prices which Mr. Schwartz asked.

The Court: That is what he claims now. He claims they were entitled to it because they were charging the same price for a fourth-run, third or fourth-run, that was charged for a second-run.

[fol. 2898] Mr. McClennen: There is nothing in this letter that bears on that in any way. I have made no objection to his stating what they were charging in admissions. I have made no objection to his stating what he was charging in admissions.

Mr. Wright: If the Court please, as to what transpired between Fox and Schine, we are not attempting to make any proof at this time, because we don't want to take up that time while this witness is on the stand. All we are attempting to show now is what transpired between the

witness and Fox and the witness and Schine. We will later offer the Schine contracts with Fox and certain communications which passed between Schine and Fox, which we think relate to this situation, but I don't see the occasion for going into that now. It is perfectly clear that that letter is competent evidence to show that whatever facts were stated there, were brought to Fox' attention at that time.

Mr. McClennen: If your Honor please——

The Court: I think it better remain identified until we [fol. 2899] get the further connection in that respect, I mean, to show the relation between Fox and Schine.

Mr. Wright: That is agreeable to us. It doesn't make any difference particularly whether it goes in now except I was going to ask the witness some questions based on what was in there.

The Court: State what was done. Those were identified before, were they?

Mr. McClennen: They were identified before.

Mr. Wright: Have you the other one?

Mr. McClennen: The other one, Exhibit 259, what has just been said has equal applicability to that. We object to it.

Mr. Wright:

Q. Now, calling your attention to this letter dated January 17th, which is marked Exhibit No. 209 for identification, I will ask you how long prior to the time you wrote that letter the admission prices referred to therein had, or that Schine had stopped charging the admission prices you are referring to therein?

Mr. McClennen: What is the date or year of the letter?

The Witness: January 17th, 1938. This referred to the summer and fall previous to January, 1938.

Q. The pictures that you played then, and it referred to [fol. 2900] Fox pictures that were played when with reference to the time they were played in the Schine theatres?

A. I didn't get that.

Q. It referred to Fox pictures that were played at what time in your theatre with reference to the time they were played in the Schine houses?

A. It was about six months after the first-run in the Schine houses. They were played during the summer of 1937 and I was getting them available in January, 1938.

Q. You were playing them after they had been run in Schine houses?

A. In all three houses of Schine. I was playing them fourth-run.

Q. Was the same thing true with reference to this letter I have shown you marked Exhibit 259, dated September 30th, 1937?

A. That refers to Paramount pictures, yes, sir.

Q. And those were pictures that you had played after they had played in the Schine houses at the same admission prices you were charging?

A. Yes, sir.

Mr. McClennen: What is the date?

Mr. Wright: September 30th, 1937.

Q. Now, then, during the winter of 1937-38, as I understand it, both the State and Strand continued to charge 16 [fol. 2901] cents at night for the pictures they played?

A. The State charged 16 cents, but the Strand charged 22 at night.

Q. That was on the main floor?

A. On the main floor and 16 in the balcony.

Q. In the balcony?

A. Yes, sir.

The Court: Was that just during the summer months?

The Witness: It was during the summer and fall.

Q. I was calling your attention now to the price charged during the winter and specifically with reference to the balcony and main floor Strand prices.

A. I honestly don't remember that winter price of 1937 and '38.

Q. You don't remember whether the price at the Strand balcony was the same that you were charging at the Opera House?

A. Not in the winter, Mr. Wright, I don't remember that. I remember the summer and fall prices, but I don't remember that.

Q. Was there a change made again, beginning the spring and fall?

A. In the summer and fall a change went into effect again, the summer price.

Q. That continued for what period?

[fol. 2902] A. July through September, I believe.

Q. What were those prices?

A. The matinee price at the Strand of the lower floor was 16 cents and at the Ben Ali the lower floor price was 27, first-run, and 16 cents balcony, matinee price.

Q. At the State?

A. The State, the price was always 10 cents matinee and 16 cents at night.

Q. Did you give the evening admission price for the Strand?

A. The evening admission price was 22 cents on the lower floor at the Strand and 16 cents in the balcony.

Q. How big was that balcony, do you know?

A. The balcony at the Strand was about 400 seats.

Q. Now, did you make any changes in your admission price during this same period?

A. No, I didn't.

Q. You maintained what price?

A. 10 cents matinee and 16 cents at night.

The Court: How much at night?

The Witness: 16 cents.

[fol. 2903] Q. After November, 1937, did you then have any first-run product at all?

A. Yes, I had some, what is known as independent product. I had Republic first-run.

Q. Did you have any major product?

A. No major product.

Q. All the major product you played you followed the Schine houses?

A. Yes, I did.

Q. Calling your attention to the year 1937, did you at any time that year go to Paris, Kentucky?

A. Yes, I drove through Paris on my way to Cincinnati.

Q. About when was that?

A. This was in the early summer, 1937.

Q. Did you observe anything there with respect to theatres and proposed theatres?

A. Yes, I noticed the Bourbon Theatre of Paris.

Q. Is that a Schine Theatre?

A. It was operated by the Schine Theatre Company.

Q. Did you observe anything else with respect to theatres?

A. Yes, I observed a sign on a building that Schines' were going to build a new theatre in Paris.

Q. Then did you later return to Paris in 1938?

A. Yes, I did.

Q. When was that?

[fol. 2904] A. In the summer of 1938.

Q. What did you observe then with reference to the sign you had previously seen?

A. I noticed that it was in a broken-down condition and the reading matter practically obliterated?

Mr. Wright: I will ask to have this document marked with the next Plaintiff's exhibit number for identification.

(Lease made by Mr. Schwartz in Paris, Kentucky, marked Plaintiff's Exhibit 823 for identification.)

Q. I call your attention to this Exhibit B, attached to Exhibit 823 for identification, and ask you if that is a copy of a lease you made for property in Bourbon, on or about November 2, 1938?

The Witness: Bourbon County, Paris, Kentucky.

Mr. Rogers: You mean Paris.

Q. Paris, Kentucky, I beg your pardon.

A. Paris, Kentucky.

The Court: I thought you said something about Bourbon.

The Witness: Bourbon County.

Q. I meant Paris instead of Bourbon.

A. Yes.

Q. When was this lease you just referred to made with reference to that trip?

[fol. 2905] A. November 2, 1938.

Q. I say, that was how long after you made this trip you have just referred to?

A. About four months after.

Q. What was the purpose in making the lease?

Mr. McClennen: That is objected to.

The Court: Sustained. The lease, I suppose, shows.

Mr. Wright: The lease discloses the premises that are leased.

The Court: I will let him state what he did.

Mr. Wright: I beg your pardon. I believe it does.

Q. After or at the time you made this lease what, if any, efforts did you make to find out what pictures you could get for exhibition in a theatre in Paris?

A. I wrote all the film companies in the Cincinnati office asking for pictures for Paris.

Mr. McClennen: Just a moment. Don't state the contents of the letter, please.

The Witness: O. K.

Mr. McClennen: May that go out?

Mr. Wright: Surely. You wrote all film companies?

The Witness: Yes, sir.

Mr. Wright: I will ask to have these four letters marked with the next plaintiff's exhibit numbers.

[fol. 2906] (Four letters written by Mr. Schwartz to film companies in Cincinnati office were marked Plaintiff's Exhibits 824, 825, 826 and 827 for identification.)

Q. I will show you these Exhibits 824, through 827, and ask you if these are all of the replies you have been able to locate?

A. Yes, sir.

Mr. Wright: I offer those in evidence.

Mr. McClennen: The general objection. They appear to be authentic letters.

The Court: You raise no question about the authenticity of them?

Mr. McClennen: We assume they were signed by the persons who appear to have signed them.

The Court: Overruled.

(The four letters, previously marked as Plaintiff's Exhibits 824, 825, 826 and 827 for identification, were received in evidence.)

Mr. Wright: Exhibit 824 is a letter from J. J. Grady, branch manager, on the Fox Corporation stationery, to Harry Schwartz, dated November 7, 1938. It says: "Thank you for your letter of November 4th. We regret that our product apparently will not be available for you in Paris, [fol. 2907] inasmuch as we have a contract with Schine there and, of course, inasmuch as they are our old account in the town we shall continue to offer our product to them in accordance with the policy of our company."

Exhibit 825, also dated November 7, 1938, from RKO Radio Pictures, Inc., S. C. Jacques, branch manager, to Mr. Schwartz,

"Dear Harry, replying to your letter of November 4th, all of our services are under contract to play first-run at Paris, Kentucky, but by the time you begin operation in that situation, which according to your letter will be March 1, 1938, we may have some service available for you."

The next letter is Exhibit 826, from Universal Film Exchanges, Paul E. Kreiger, branch manager, to Mr. Schwartz, dated November 10th.

"Note from your letter of November 4th that you anticipate building a new theatre in Paris and expect to be in operation by March 1st. For your information, our product [fol. 2908] has already been sold in Paris but, however, there is a possibility of serving you with various pictures that have not been played in Paris during the past year. It is my suggestion that you let this matter rest until you are ready to open this new house."

By Mr. Wright:

Q. After you received these three letters I just read did you have conversations with these branch managers?

A. Yes, I did.

Q. Where did you see Mr. Grady?

A. Saw Mr. Grady in his office in Cincinnati.

Q. That was how long after you got the letter?

A. Within thirty days after I got the letter.

Q. What was the conversation you had with him there?

Mr. McClennen: Same objection.

The Court: Same ruling. Go ahead.

A. I told him that I was going to build this theatre and needed some first-run product, and received his letter that he had——

Q. I am referring to what happened after you got the letter. Oh, you referred to the letter?

A. Yes, I referred to the letter, and told him I realized [fol. 2909] by his letter he was tied up with Schine's first-run and asked him for second-run product.

Q. What did he say to that?

A. He said that he was sorry but he could not say at that time whether I could have second-run for the town or not.

He had heard Schines were going to build a theatre in Paris and they were their first-run account and they would have to protect them as far as the second-run is concerned, if they were going to build.

Q. Is that all the conversation you had with him?

A. That is all.

Q. After you got this letter of November 7, Exhibit 825, from Mr. Jacques, did you go to see him?

A. I had about the same conversation with him.

Q. Just give us the substance of it, as nearly as you can recall.

A. I told him that I had received his letter——

Mr. McClennen: Just a moment. Same objection, please.
The Court: State what was said.

A. I told him I had received his letter in which he informed me that the first-run was sold to Schine Theatre interests, and asked him for second-run. He also told me that Schines had anticipated building another theatre in Paris; as long as they were their first-run account he would have to wait to see whether they wanted the second-run or [fol. 2910] not.

Q. What was the conversation you had with Mr. Kreiger after you got the letter of November 10th, marked Plaintiff's Exhibit 826?

Mr. McClennen: Same objection.
The Court: Same ruling.

A. He told me that the Schine interests had their first-run account in Paris and that he had heard they were going to build another theatre, and would not be able to give me any information about the second-run until later.

Mr. Wright: Then this letter of November 28, 1938, which has been marked as Plaintiff's Exhibit 827 is from Mr. A. L. Schmitkin of Warner, to Mr. Schwartz, in which he states: "Inasmuch as we have heard nothing from you regarding our offer for second-run product in Paris, Kentucky, we have taken it for granted that it is not your desire to use our service in this situation and have therefore opened negotiations with another outfit for this product. If we are unable to make a satisfactory deal we will again contact you in an effort to reopen negotiations."

[fol. 2911] By Mr. Wright:

Q. Prior to the time you got this letter of November 28th had you had any discussions with Mr. Schmitkin with reference to second-run of his pictures?

A. Yes.

Q. When was that?

Mr. McClennen: Same objection.

The Court: Same ruling.

A. It was about the 10th of November.

Q. About the same time you talked with the other people about the second-run?

A. Yes, sir.

Q. What was said then?

Mr. McClennen: Same objection.

The Court: Same ruling.

A. I asked him for a second-run in Paris and he told me that he would let me know later on, that he was not definitely sure second-run was available—open—and I told him as soon as he found out to write to me. He did.

Q. Did you say anything to him about notifying him?

A. I told him that I would come to Cincinnati a little later to make a deal, if it were possible to get second-run pictures from the other companies also.

Q. Did you go to Cincinnati to make a deal with him?

[fol. 2912] A. No, I did not go to Cincinnati.

Q. Why not?

A. I had found out from the other companies that they could not sell me second-run.

Q. After or in 1939 did you enter into this lease that is marked "A" of Plaintiff's Exhibit 823 for identification?

A. Yes, I did.

Q. When was that?

A. 22nd of April, 1939.

Q. That was the date you made the lease?

A. Yes, sir.

Q. What were those premises described in Exhibit A, with reference to those described in Exhibit B of Plaintiff's Exhibit 823?

A. They joined.

The Court: Is 823 split, A and B?

Mr. Wright: 823 has an Exhibit A and B.

The Court: One is the lease of 1938 and the other 1939?

Mr. Wright: Yes.

Q. Those were for adjacent premises?

A. Yes, sir.

Q. When was it that you started to construct a theatre there in Paris?

The Court: Where?

Q. In Paris, Kentucky.

[fol. 2913] A. When was it?

Q. Yes.

A. I started construction in July, 1939, or 1938—July, 1938.

The Court: July, 1938?

The Witness: Yes, sir.

Q. Was it before or after this second lease that you described as having been made in April, 1939?

A. Pardon me. It was 1939. I made a mistake. It was after I acquired this lease.

Q. It was July you began the construction of the theatre?

A. 1939.

Q. Then did you notice whether there was any other theatre construction in the town at or about that time?

A. Yes.

Q. Where was that?

A. That was on the lot that I had seen the sign on which it said Schines would build a theatre.

Q. Do you remember when that construction was started with reference to the time you started yours?

A. It was about the same time, within a few days of each other.

Q. Do you recall which was first?

A. I believe mine was first.

Q. Did you ever have any conversations with Mr. Lazar [fol. 2914] of the Schine Company with reference to Paris?

A. Yes, I did.

Q. When was the first time?

A. Two days after I acquired the lease.

Q. That is, the lease of November 2, 1938?

A. Yes, sir.

Q. How did that conversation come about?

Mr. McClennen: Just a moment. That I object to. I might, in anticipation of the conversation that is coming,

ask that our objection be saved, that this is a purely local transaction, having no relation in any way to interstate commerce.

The Court: This question, of course, you do not object to, how this conversation came about?

Mr. McClennen: Yes, I object to that, and of course the conversation.

The Court: Overruled. How did this conversation come about?

The Witness: I walked into the First National Bank in Lexington, Kentucky, and in conversation with the banker, had told him that I had just signed a lease——

The Court: You cannot state what you told him.

The Witness: I am just telling how it came about. I met the banker and the banker told Lazar about it.

[fol. 2915] The Court: You don't know whether that is so or not.

The Witness: He told me so.

Q. When you had this conversation with Mr. Lazar did you call him or did he call you?

A. Oh, no, I never called Mr. Lazar.

Q. Did he call you?

A. Yes.

Q. In person or by telephone?

A. Telephone.

Q. What did he tell you when you had the telephone conversation?

Mr. McClennen: This is the objection.

The Court: Overruled.

A. He told me — had heard from my banker that I had signed a lease.

Q. What else did he say?

A. He asked me if I had not seen the sign on the lot he had purchased some time ago in Paris, that they were going to build a new theatre on it. I told him that I had and then he said that they had every intention of building a theatre in Paris and were not decided on just what type or what size, and that is why they had not begun earlier. He felt that I was——

Q. Did he say all this over the telephone?

[fol. 2916] A. Yes, sir.

Q. Go ahead.

A. He felt that I was making a mistake in building in competition with them, and I told him that I did not think so or I would not have signed a twenty-year lease on the main corner of the town. I told him that I felt that I had the best location in Paris and that the theatre would be self-supporting, and then he asked if I would not come to meet him at the Lafayette Hotel and I said I would be glad to, and we met later on that day.

Q. At the Lafayette Hotel?

A. At the Lafayette Hotel.

Q. Who else was present?

A. No one. Mr. Lazar and myself.

Q. What was said then?

Mr. McClennen: Same objection.

The Court: Same ruling.

A. He said he did not feel that Paris could support three theatres and that—he said that as long as they had been in Paris operating a theatre and had anticipated building a new larger theatre that he could not quite understand what would prompt me to go into the town as competition. I still repeated that my location was better than his two [fol. 2917] and that I was not afraid of competition. He then asked me to think things over and he said that he felt that I was making a grave mistake and would lose plenty of money, and he said, "If you care to, I will take this lease off your hands," and I said, "For how much?" And he said, "You don't"—let's see—he said, "Are you trying to hold me up?" I said, "No, I am not trying to hold you up. You called me up. I did not come to see you or call you up." He said, "Well, I believe that Mr. Schine would be willing to take this lease off your hands, relieve you of that obligation." I said that I was not intending to give up that lease, that I was going ahead with the theatre and that ended the conversation.

Q. Then did you see Mr. Lazar again?

A. Yes.

Q. When was that?

A. Oh, probably it was three or four months after that first conversation.

Q. Whereabouts?

A. In the office of the Ben Ali Theatre in Lexington.

Q. Was that before or after you had begun construction on your theatre at Paris?

A. That was before.

Q. What was said then?

A. It was purely a social call.

[fol. 2918] Q. Then did you see him after you started construction on your theatre?

A. He called me on the telephone.

Q. That was where?

A. At Lexington, Kentucky.

Q. What was said then?

A. He asked me whether I was still determined to build that theatre or whether I was just starting operations to stop within a week or so.

Q. What did you tell him?

A. I told him no, I had all intentions of going ahead, had the plans drawn by a theatre architect in Columbus, Ohio, the Y. & S. Construction Company, and that the contract had been signed to build the theatre, and I had full intention of building it.

Q. That was before or after you started construction?

A. That was after I started construction.

Q. After the construction began?

A. Yes.

Q. Was anything else said?

A. He told me that this offer was still good, to take the lease off my hands, and I said I did not believe I would care to sell the theatre or assign the lease.

Q. When was the next time you saw him or talked to him?

A. Next time was about three weeks later, after my thea-

[fol. 2919] tre had the side walls already constructed.

Q. Where was that that you saw him?

A. He called me on the telephone.

Q. Where?

A. In Lexington, Kentucky.

Q. What was said then?

A. Asked me to stop construction and come to see him about a deal.

Q. Did you do that?

A. Yes, I did.

Q. Where did you see him then?

A. Lafayette Hotel.

Q. Anybody else present?

A. No, sir.

Q. What was said then?

Mr. McClennen: Same objection.

The Court: Overruled.

A. We went over the same discussion, about the operation in Paris, and what losses could be incurred, and he then told me that he was willing to enter into a deal with the Opera House property in Lexington and my Paris theatre, and also a theatre that I was operating in Frankfort, Kentucky.

The Court: Was he building at that time in Paris?

The Witness: Yes, sir, he was building also.

[fol. 2920] Q. Did you make a deal then?

A. Yes, sir, we entered into a deal after about fourteen hours.

Q. Did you then stop construction of your theatre?

A. Yes, I stopped construction after that day.

Q. That was about when?

A. That was about September 15, 1939.

Q. The deal that you finally made is the one incorporated in this Exhibit 823 for identification?

A. Yes, sir. I would like to change that date there. That was about August 30th.

Q. This agreement, marked Exhibit 823 for identification, was made on or about September 15, 1939?

A. Yes.

Q. This conversation you referred to was about a month before?

A. That is right.

Mr. Wright: We offer this Exhibit 823 in evidence.

Mr. McClennen: We make the objection that this has no reference in any way to interstate commerce or calculated or likely to have any effect on interstate commerce and it is purely a local transaction.

The Court: I take it this exhibit purports to construe the contract signed, and also the leases.

Mr. Wright: Copies of the leases are attached.

[fol. 2921] The Court: Is the contract marked "C" or how?

Mr. Wright: The contract is marked 823 for identification.

The Court: Received.

(The contract, previously marked as Plaintiff's Exhibit 823 for identification, was received in evidence.)

[fol. 2922] Q. This is an agreement——

The Court: The agreement is also with the other theatres?

Mr. Wright: I will read it, it will appear what it covers. The contract is between "Harry Schwartz, Charles J. Schwartz, and Vernon K. Schwartz, on the one hand, and Schine Lexington Corporation and Southland Amusement Company, Inc.

Q. By the way, Southland Amusement Company, Inc., was the name of the corporation under which you operated the Opera House?

A. The Opera House, Lexington.

Q. Charles J. Schwartz was your brother?

A. Yes, sir.

Q. And Vernon K. Schwartz was your wife?

A. Yes, sir.

Q. I won't read all of the agreement at this time. I just want to call your attention to this paragraph 3 on page 4:

"In order to induce the assignee to purchase the two leases above-mentioned, and to pay the consideration hereinafter set forth therefor, the assignor and the associates hereby jointly and severally covenant and agree to and with the assignor, its successors and assigns, that they will not, nor will any one or more of [fol. 2923] them, for and during a period of 15 years from and after the date hereof, be or become engaged in or participate or have any interest of any nature whatsoever in, the motion picture, theatrical or amusement business in the capacity of owner, employee, partner, stockholder or in any other manner whatsoever, either directly or indirectly, in any town or city in the State of Kentucky, in which the assignee or any of its affiliated or associated companies are now engaged in business, provided, however, that this covenant shall not prevent the assignor or the associates from investing in stocks or securities listed upon any recognized Stock Exchange."

Paragraph 6 states: "In full payment and compensation of and for the grant and assignment of the two said leases and all rights granted unto the assignee hereunder, and all warranties, covenants, promises and agreements of the assignor, the associates and the

guarantors herein, the assignee has agreed to pay and upon the execution and delivery of these presents has paid unto the assignor the sum of $5,000, the receipt whereof by the assignor is hereby acknowledged."

The Court: This doesn't have anything to do with the other theatre.

Mr. McClennen: Is that the whole of the consideration [fol. 2924] stated in the agreement?

The Court: Does that have anything to do with the other theatre?

Mr. Wright: I take it this agreement has nothing to do with the agreement in Frankfort.

The Witness: Yes, at Lexington, but that isn't the right consideration, it is a different paragraph.

Q. That is right, this agreement that is marked 823 merely refers to the Paris properties, is that right?

A. That is right.

Q. Then the one which refers to the Opera House is this one I hand you now?

A. Yes, sir.

Mr. Wright: I will ask to have that marked with the next plaintiff's number for identification.

(Thereupon the document referred to was marked as Plaintiff's Exhibit No. 828 for identification.)

Mr. McClennen: Before departing from the partial statement of the consideration in the Paris agreement it also has an assumption of liabilities.

The Court: I assume so.

Mr. McClennen: As well.

The Court: I supposed that.

By Mr. Wright:

[fol. 2925] Q. This agreement marked Exhibit 828 for identification is the one you just referred to as relating to the Lexington property?

A. Yes, sir.

Q. The Opera House?

A. Yes, sir.

Q. That agreement was made at the same time as Exhibit 823?

A. Yes, sir.

Mr. Wright: I also offer that in evidence.

Mr. McClennen: This is subject to the same objection as the other.

The Court: Same ruling.

Mr. McClennen: That applies only to the Opera House in Lexington.

Mr. Wright: I believe it does. I will read it, just a moment.

(Thereupon document previously marked as Plaintiff's Exhibit 828 for identification was received in evidence.)

Mr. Wright: This is between the Southland Amusement Company, Inc., and Schine Lexington Corporation, and Harry Schwartz, Vernon K. Schwartz, his wife, and Charles J. Schwartz.

Mr. McClennen: What is the date?

Mr. Wright: The date of this is the same as the other, [fol. 2926] the 15th of September, 1939. This is an assignment, paragraph one of which says:

The lessor hereby grants, sells, assigns and transfers unto the lessee absolutely and forever the entire and complete business and good-will of the motion picture, theatrical, amusement and exhibition business, heretofore conducted by the lessor in the City of Lexington, Kentucky, and specifically in the theatre known as the Opera House, Lexington, Kentucky."

Then the lease also contains a similar convenent in paragraph 3, not to engage in the theatrical business for the same period of time similar to the one I just read.

The Court: Is there any consideration?

Mr. Wright: Well, the consideration is stated the same way, "In order to induce the lessee"——

The Court: I mean in dollars and cents.

Mr. Wright: The consideration of the agreement, paragraph 4 states: "In full consideration of and payment for the sale of the said business and good-will and the making of the lease herein provided for, and all of the other covenants and agreements of the lessor and the stockholders [fol. 2927] herein set forth, the lessee agrees to pay unto the lessor the sum of $22,500 payable as follows: $10,000 to be deposited in escrow, and $5,000 six months after the date and $7,500 twelve months after the date."

By Mr. Wright:

Q. Calling your attention to Lexington again, what was the admission price policy of the Schine theatres there, during the summer, spring and summer of 1939, before you made that agreement?

A. 40 cents at the first-run houses in the evening and 25 cents matinee; that is the Ben Ali and Kentucky Theatres.

The Court: Was that changed from what it had been?

The Witness: No, sir. And the Strand second-run house charging 25 cents at night 15 cents in the afternoon.

By Mr. Wright:

Q. How about the balcony price?

A. That was the same at that time.

Q. At what time are you referring to now?

A. In 1939.

Q. You mean the prices were not cut again in that summer?

A. No, they weren't cut then.

[fol. 2928] Q. The price cut occurred only in the summer of 1937 and 1938?

A. Yes, sir.

Q. What were the other prices?

A. The State Theatre, 10 and 15, 10 cents matinee and 15 cents at night.

Q. Then were you still playing the major product that you played at the Opera House behind the Schine Theatres?

A. Yes, sir.

Q. The Ada Mead Theatre was still open then, was it?

A. Yes, 10 cents.

Q. Operating at the 10-cent price?

A. Yes, sir.

Q. Then after you leased the Opera House to Schine, do you know what, if anything, occurred with reference to the admission prices there?

A. About six months afterwards admission prices were raised at the Opera House.

Q. To what, do you know?

A. 16 cents matinee and 22 at night.

Q. And the other Schine houses were also raised?

A. No, sir.

Q. Do you remember whether they were subsequently raised to higher prices?

A. Well, with the increase in the taxes, state taxes, the [fol. 2929] prices were raised a few cents, not very much.

Q. Do you remember when that occurred?

A. No, I don't.

Q. Do you remember when the Ada Mead was closed?

A. I didn't get the last word.

Q. Do you remember when the Asa Mead Theatre was closed?

A. It was closed about a year ago.

Q. And——

Mr. McClennen: I ask to have that last stricken out as coming after May, 1942.

Mr. Wright: Well, if the Court please, I take it that it is competent to show what the conditions of the various properties involved here are even up to the present time. I would see no reason for excluding that.

The Court: Well, it is quite remote, isn't it, two years after?

Mr. Wright: Well, from the standpoint of relevancy, I take that to be a different objection. I understood the objection was it was not proper to show anything that had occurred with reference to the status of closed or open theatres after May, 1942. I would assume evidence of that character would be pertinent and applicable today.

[fol. 2930] Mr. McClennen: The objection was based on our reliance on the statement made in the opening which we believed was going to be performed and, if this is in no way connected with an improper act of any kind on the part of the defendants, it has no purpose in this case; if it is offered as anything that was improper, the offer is in violation of the undertaking of plaintiff's counsel.

The Court: I think it is remote as far as the evidence now shows. Sustained. Strike it out. Was there an answer?

Mr. McClennen: He had answered, yes.

The Court: Strike the answer out.

By Mr. Wright:

Q. Do you know, Mr. Schwartz, when the Ada Mead was acquired by the Schine interests?

A. No, I don't know definitely, some time after I sold the Opera House.

Q. And have you, yourself, had any connection with the Opera House after it was taken over by Schine other than as lessor or other than your connection with the, I believe, the Southland Amusement Company, which is the lessor?

A. No, sir.

Mr. Wright: I think that is all.

[fol. 2931] Cross-examination.

By Mr. McClennen:

Q. Plaintiff's counsel referred, in one of the questions, to your playing after the four Schine houses; is it a fact that the first-run houses played on different first-run pictures so that you never played at after more than three of the first-run houses?

A. Yes, sir.

The Court: Speak up.

The Witness: Yes, sir.

Q. The Metro pictures that you were playing, were part of them old pictures that were from a year to a year and a half old when you made the contract with Metro, am I right?

A. Part of them, yes, sir.

Q. Your Fox contract, to which reference has been made in the testimony, was for third-run in Lexington?

A. Yes, sir.

Mr. Wright: Was that contract identified?

Mr. McClennen: Our copy doesn't bear any identification nor I don't know whether it is one that is in your group or not.

Mr. Wright: Will you give us a description of it?

Mr. McClennen: It is a Fox contract, August 6th, 1937, [fol. 2932] for the entire line of K-5 product.

The Court: You mean that is for the year?

Mr. McClennen: That is for the 1937-38 product, that is, it was?

The Court: The entire line of Fox?

Mr. McClennen: The entire line of Fox of the K-5 product of 1937-38.

The Court: What run?

Mr. McClennen: Third-run.

Mr. Wright: Are you going to identify it and offer it? This is apparently a photostat. I don't suppose it makes any difference.

Mr. McClennen: I have no objection to its going in. I have put in all that I am concerned about. If you want to put it in now——

Mr. Wright: No, if you are not through with your cross-examination, go ahead.

Mr. McClennen: I have no objection to your putting it in right now if you want to.

Mr. Wright: We might as well have it marked then so we will know what he is talking about.

(Thereupon photostatic copy of Fox contract, dated August 6, 1937, referred to was marked as Plaintiff's Exhibit No. 829 in evidence.)

[fol. 2933] By Mr. Wright:

Q. This Exhibit 829 is a photostatic copy of the contract counsel just asked you about?

A. Yes, sir.

Mr. Wright: We offer it.

The Court: Received.

By Mr. McClennen:

Q. Prior to the Schine acquisition in November, 1936, of the great majority of the stock of the Phoenix Amusement Company, the active persons operating had been Hannabelle Ward and John Elliott?

A. Yes, sir.

Q. The 10 and 15 cent admission prices at the Opera House were first started by you when?

A. In about 1934, I believe.

Q. And prior to that time what had the admission prices at the State been?

A. I don't remember that, I wasn't in Lexington until November, 1934. I had a resident manager there.

Q. And you installed these prices in 1934 at the beginning of your personal operations there?

A. Yes, the prices changed according to the policy that I had.

Q. The prices at the Opera House had been greater before that?

[fol. 2934] A. No, sir, had been less, 10 cents, any seat, any time, afternoon or evening.

Q. That had been the Opera House policy?

A. That was the policy from the beginning in 1931 until about 1934.

Q. And during that period when you had the 10-cent policy, straight 10-cent policy, the admissions at the State had been higher than they were at the Opera House?

A. Yes, sir.

Q. You had had a given number of years experience in the exhibition motion picture business?

A. Yes, sir.

Q. In the common business sense, Paris was not big enough for more than two theatres, was it?

A. That is right.

Q. And when you started on your plan of constructing in Paris, you knew that the Schine interests were already operating the Morgan Theatre?

A. Yes, sir.

Q. You, in your subsequent dealings with the Schine interests were met only with courtesy and fair discussion of negotiations?

A. Yes, sir.

Mr. Wright: If the Court please, that calls for a conclusion as to what he thought about whether it was courteous [fol. 2935] and fair; I don't know how that is relevant here. He can state what the facts were.

The Court: It is cross-examination. There is nothing in the record to show that it was otherwise.

Mr. Wright: He hasn't testified that Mr. Lazar punched him in the nose or was discourteous in any way.

Mr. McClennen: No, but Mr. Lazar might have interrupted him right in the middle of the conversation or otherwise, and I am asking him whether——

The Court: He has answered it.

Q. You were not intimidated in any way?

Mr. Wright: If the Court Please, that calls for a conclusion that certainly I suppose is to some extent for the Court.

The Court: There is no evidence to show intimidation at this time. I suppose it is meant intimidation by some threats.

Q. Of any kind, threats or anything else?

Mr. Wright: I think that is much too broad to permit the witness to answer. If he has some specific threat in mind he can inquire about it.

Mr. McClennen: No, I have the absence of any specific [fol. 2936] threat in mind, that is what I am inquiring about.

The Court: You mean by that, threat, that is your conclusion?

Mr. McClennen: Yes, I will take it.

Q. Were any threats made to you?

A. Threats?

Q. Yes.

A. No, sir.

Q. The transaction which you entered into that resulted in the two agreements, Exhibits 823 and 828, was entered into by you because you thought it was a good business deal for you to make?

A. Exactly.

Q. In connection with the acquisition of the Lexington property you got not only the money consideration but a new lease running to you as lessor?

A. Yes, sir.

Q. At a rental which you thought fair and satisfactory?

A. Yes, sir.

The Court: Speak up, witness.

The Witness: Yes, sir.

The Court: The stenographer has to take it down.

The Witness: All right, yes.

Q. Reference has been made to your engaging not to go [fol. 2937] into business, in this exhibition business in Kentucky in towns where Schine interests were then operating. Before you entered into that agreement had you been told what those towns were?

A. No, I knew what they were at the time.

Q. Will you follow this list and see if I have stated all of those that you refer to, namely, Middlesboro, Corbin, Pikesville, Paris, Richmond, Lexington and Maysville?

A. Yes, sir.

Q. You spoke about starting the construction of the theatre, by that, did you mean starting the demolition or the alteration of the existing building?

A. The demolition, of course, started first, but the construction started immediately after.

Q. Do you bear in mind the date when you started on new construction?

A. No, I don't.

Q. What sort of a building was on the premises?

A. It was a store building with living rooms above.

Q. And——

The Court: Frame construction?

The Witness: Brick construction.

Q. Is that building still on the premises?

A. No, sir.

[fol. 2938] Q. Is there anything on the premises, or was there on May 18, 1942, anything?

A. I don't remember. I have not been in Paris for some time.

Q. You have seen the theatre that the Schine interests built, called the "Paris"?

A. Yes, sir, I have.

Q. It is a very fine theatre?

A. Very fine.

Q. It would have been suicidal for somebody to have two new theatres put into that town, on top of those that were already there?

The Court: He has already said the town was not big enough for more than two theatres.

Mr. McClennen: That is all.

Redirect examination.

By Mr. Wright:

Q. Just one question. Is that the answer you gave on cross examination, that you did not think the town was big enough for more than two theatres?

A. There was only one at the time.

Q. I say, your answer was if was not big enough for more than two?

A. More than two, yes, that is right.

Q. Your testimony with respect to United Artists was, I believe, that you had the first-run 1934-1935?

[fol. 2939] A. Yes, sir.

Q. And then the 1935-1936 product, do you recall what you played, when you played that?

Mr. McClennen: Just a moment. This was not touched in cross.

The Court: I know that is true, but I will permit it.

Mr. Wright: That is right. I just want to find out what finally happened.

The Court: Proceed.

The Witness: Fourth-run.

By Mr. Wright:

Q. 1935-1936?

A. Fourth-run.

Q. You are sure you had it in 1935-1936 or 1936-1937?

A. I had first-run 1934-1935, and fourth-run—I am not sure—I don't know just what that was.

Q. Whatever runs you did have would appear on the——

A. —contracts.

Q. —contracts that were made. I believe those have already been identified. You dont' remember. It appears from the contracts that you had some pictures third-run and some fourth. You don't remember when that change occurred?

A. No, I don't remember.

Q. Don't have any recollection about negotiations in con-
[fol. 2940] nection with those runs?

A. No, sir, I don't.

Mr. Wright: That is all.

Raymond C. Todd a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Marcus:

Q. Mr. Todd, where do you reside?

A. Salisbury, Maryland.

Q. What is your occupation?

A. I am one of the managers of the Ulman Theatre Corporation.

Q. Is that the only theatre you manage?

A. No, we have two theatres, the Ulman Theatre and the New Theatre.

Q. What other theatres are there in Salisbury?

A. There is the Arcade Theatre, Wicomico Theatre, and the Ritz Theatre, which is a colored house.

The Court: How many all together?

The Witness: Five.

Q. Which of those theatres are the first-run theatres in town?

A. The Arcade Theatre and the Ulman Theatre and the New Theatre.

[fol. 2941] Q. Do you recall when Schine took over the operation of the other theatres in the town?

The Court: Other than the first-run?

Mr. Marcus: No, other than the theatres operated by the Ulman Corporation.

A. The Arcade Theatre, I think it was in September, 1938, and I think the Wicomico was taken over shortly after. I don't remember.

Q. Who were operating those theatres prior to that time?

A. Mr. Lee Insley of Salisbury operated the Arcade Theatre and Mr. Marsh Golner operated the Wicomico.

Q. What product of the major companies were you playing at that time at the Ulman Theatres?

Mr. McClennen: This was when?

Q. This was September——

A. 1938. All of the product or just the majors?

Q. Just the majors.

A. We had Paramount, Fox and United Artists.

Q. For the 1938-1939 film season did you have all of the Paramount product?

A. No, we only had half of it.

Q. For the 1939-1940 season did you have all of the Paramount product?

A. No, only half.

Q. Going back to the 1938-1939 season, did you just state [fol. 2942] that you had half of the Paramount product?

A. The first season we had all the product, in 1938. I presume that was 1937-1938 or 1938-1939, I don't know which. I can't remember.

The Court: You said 1938-1939 you had half and 1939-1940 you had half, but 1938 you had full products.

The Witness: I might be mixed on the starting date. The first year we had all product.

Q. You say the first year. Are you referring to the time when Schines came in?

A. Yes.

Q. That would be for 1938-1939?

A. 1938-1939 product, yes.

The Court: You had the whole product that year?

The Witness: Entire product, first year, 1938-1939 product, and 1939-1940 is when we only had half.

Q. We will get to that. In reference to the Paramount product for the 1939-1940 season, did you negotiate with a representative of Paramount Company in respect to that product?

A. Before this time?

Q. In respect to the 1939-1940?

A. Yes, we did.

Q. With whom?

[fol. 2943] A. With a saleman named Daugherty.

Q. Did you sign an application for all the product?

A. Yes, we did.

Q. Did you get a contract for all the product?

Mr. McClennen: That is objected to.

The Court: The contract is the best evidence. He said he got a contract for half the product.

Q. Did you have any further discussions with any representative of the Paramount Company in reference to this season's product prior to the time you entered into a contract?

A. In reference to the entire product?

Q. Yes.

A. Prior to the time I talked to Daugherty?

Q. Prior to the time you got a contract, 1939-1940.

A. I talked to someone in Washington, with the manager in Washington, before we applied for the entire product. Was that before then or afterward you wanted?

Q. Prior to the time you obtained a contract for half.

A. Oh, yes, we talked to someone in between.

Q. What was the substance of that discussion?

A. We were told, I think, they had changed salesmen in the meantime——

Mr. McClennen: That is objected to.

The Court: You can't say what you were told.

[fol. 2944] The Witness: We were told we could buy——

Mr. McClennen: Just a moment.

Q. What did he say to you?

Mr. McClennen: Who?

Mr. Marcus: This representative.

Mr. McClennen: That is objected to until we know who he is.

Q. Do you recall the name?

A. Mr. Jack Bryan.

Q. What did he say and what did you say?

Mr. McClennen: This is objected to until we know something of the date.

The Court: Do you know what his work was?

The Witness: He was salesman for Paramount.

The Court: This is about the 1939-1940 product?

The Witness: That is right.

The Court: Received. Objection overruled. What did he say, what did you say?

Mr. McClennen: Could we have the date approximated?

The Witness: I think it was about February.

Mr. McClennen: Of 1940?

The Witness: 1940.

The Court: That would be 1939.

The Witness: What year would it be?

The Court: 1939-1940 product.

Mr. Marcus: The season starts September 1st.

[fol. 2945] The Court: I understand that. 1939-1940 product, it must be before. It could not be 1940.

Mr. McClennen: Frequently not, if your Honor please. It comes long after it.

Q. What is your best recollection as to the year?

A. If it was for 1939-1940 product it would have been in 1939, because we were buying for the following year, following season.

The Court: 1940-1941, you mean?

The Witness: No, in 1939 we were buying for the 193--1940 product. In January we would be buying it, to start in September.

The Court: That is what I say.

Q. Going back to this conversation with Mr. Bryan, what was said by him and by you on this occasion?

Mr. McClennen: That is objected to.

The Court: Overruled.

A. I asked him about buying all the product. In fact we asked him, I should say, because there were two of us at the time.

Q. Who was this other gentleman?

A. Mr. Newell Howard.

Q. Is he the other joint manager?

A. Yes.

Q. Of the Ulman Theatres?

[fol. 2946] A. That is right.

The Court: State what was said.

A. We asked Mr. Bryan——

Mr. McClennen: Just a moment. Is this intended to be a conversation in which both Mr. Howard and the witness were present?

Mr. Marcus: Yes.

The Court: With Mr. Bryan?

Mr. McClennen: Then the general objection.

A. We asked Mr. Bryan if we could buy the entire Paramount product and he told us no, that we could not buy it all, that we could only buy half; that the other half would be sold to Schines, and so then we agreed to sign a contract for the—just one-half of the product.

The Court: I guess we will have to suspend at this time.

(Whereupon a recess was taken until 2 o'clock P.M.)

[fol. 2947] After Recess, 2 P.M.

Appearances: Same as before noted.

The Court: Counsel, come up here. Mr. Rose has been subpoenaed to produce certain documents and records and he has been advised—he is willing to leave them with the

Court to be used by either party, and he wants them back. What shall we do about that?

Mr. Wright: I do not see why he should have to stay around, if he says these documents came from the file of Columbia.

The Court: I suppose he is looking towards the future of them.

Mr. Rose: My instructions are, we want to retain control of these papers, and even though they are marked in evidence we want them to be in the possession either of the Clerk or returned to us.

Mr. Wright: Why don't we have them returned to you for photostating and you can send photostats and keep the originals, or have the Clerk send them.

Mr. Rose: That will be all right.

Mr. McClennen: There may not be enough time before we want to use them.

[fol. 2948] The Court: Leave them with the Clerk.

Mr. McClennen: If they are left with the Clerk, that is entirely satisfactory to us.

The Court: All right.

Raymond C. Todd resumed the stand on behalf of the Plaintiff, having been previously sworn, was examined and testified further as follows:

Direct examination (continued).

By Mr. Marcus:

Q. Mr. Todd, I show you Plaintiff's Exhibit 268 for identification and ask you whether this is the contract of Paramount for the 1939-1940 season, signed for the Ulman Theatres in Salisbury?

A. Yes, it is.

Mr. Marcus: I will offer this in evidence.

Mr. McClennen: This is one already marked for identification.

(The contract between Paramount and Ulman Theatre for 1939-1940 season, previously marked as Plaintiff's Exhibit 268 for identification, was received in evidence.)

Mr. Marcus: This is a contract for a split of the Paramount film product for the season 1939-1940, for the Ulman and New Theatres in Salisbury.

[fol. 2949] By Mr. Marcus:

Q. Have you had a split of the Paramount product in Salisbury since that time?

A. Yes, each year.

Q. Could you state what product of the major companies the Schines had in their theatres in Salisbury?

A. At this time?

Q. No, 1938-1939.

A. Warner's, Metro, I think that is all. The Wicomico was bought later, I believe, in 1938. They just had the Arcade.

Q. What did they have for 1939-1940?

A. As I recall it, Metro, Columbia, Republic and Universal.

Q. Have they retained that product, as far as you know?

A. Up to what time?

Q. Up to May of 1942.

A. Yes.

Mr. Marcus: Your witness.

The Court: Is that all on direct?

Mr. Marcus: That is all.

Cross-examination.

By Mr. McClennen:

Q. You had some Paramount pictures in some years before 1938-1939 product, did you not?

[fol. 2950] A. Yes, sir.

Q. Except for that one year of 1938-1939 the most that you had had was a split of the Paramount product?

A. That is right.

Q. Do you remember whether it was an even split or whether Mr. Insley had a larger proportion than you did?

A. I think it was an even split. I am not sure.

Mr. McClennen: That is all.

Redirect examination.

By Mr. Marcus:

Q. One question. Did the Schine theatres play the Paramount film product for 1939-1940 at Salisbury?

A. The balance of the product, any of the product?

Q. Yes.

A. They played part of it, I think. They did not play all.

Mr. Marcus: That is all.

Recross-examination.

By Mr. McClennen:

Q. I should have asked you. Didn't Mr. Insley also have RKO?

A. I don't think so. I think the Wicomico had RKO. I am not positive.

Q. The Wicomico had RKO?

A. Wicomico had RKO. I am not positive.

Q. Before Schines got that that was Mr. Golner?

[fol. 2951] A. That is right, yes.

Q. He had RKO?

A. He had RKO.

Mr. McClennen: Thank you.

Bernard Ulman, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Marcus:

Q. Will you state your residence, Mr. Ulman, Please?

A. 2613 Springdale, Baltimore.

Q. What is your occupation?

A. I am manufacturing pharmacist.

Q. Do you operate the Ulman and New Theatres in Salisbury, Maryland?

A. I am president of the corporation.

Q. Which operates those theatres?

A. Those two theatres.

Q. For how long a time have they been operated under your corporation?

A. Since 1931.

Q. Mr. Ulman, have the Schines ever discussed with you [fol. 2952] the purchase of your theatres in Salisbury, Maryland and, if so, will you state approximately the first time such discussions were had and with whom?

A. In June, 1940, I think is the date, my sister, Miss Helen Ulman received a letter from Mr. ——

Mr. McClennen: Just a moment.

Q. Just state what you know personally.

The Court: Your personal knowledge.

Mr. McClennen: This, if your Honor please, is subject to the same objection. It does not affect and cannot affect interstate commerce in any way and is merely local.

The Court: Is that the only ground of objection? He stated his sister received a letter.

Mr. McClennen: That was his error, not the questioner.

The Court: You asked whom he had a talk with.

Q. Yes.

A. Mr. John May.

Q. Where was this?

A. In Baltimore, in my office.

Q. Approximately when?

A. That was in 1941, May or June, 1941.

Q. What was the substance of that conversation?

Mr. McClennen: Well, that is objected to, and first, we [fol. 2953] would rather have the words of it, if he can give it.

The Court: Yes, state what was said.

Q. State what was said to the best of your recollection.

A. Mr. May came to see me and wanted to lease our two theatres for the Schine theatres, and he wanted to know what our sales were in order to base his offer. I asked him for an offer and he wanted the figures of the amount of business we were doing, and I did not give him the figures, and the understanding was that he was to come back later, and he did come back. I think he had Mr. Lee Insley with him. I don't know whether it was on the first or second visit, and nothing was done further because I didn't give him any figures.

Q. Was there a further conversation with representatives of the Schines in respect to the purchase of your theatres, and place it?

A. Well, we had fire at the Ulman Theatre, it burned in June of 1941, and shortly after the fire Mr. May came to see me and wanted to buy the property.

Q. Was he alone?

A. Mr. Insley was with him on one of the trips, I don't know if it was that one or not; I think it was that trip, so I told him I thought we were going to rebuild. He said he didn't think it would be very advisable, because we were going to have difficulty in getting pictures after we rebuilt [fol. 2954] on account of the war situation, and he didn't think the theatre was needed in the town.

Q. Was there anything more said?

A. He said that they would give us a guarantee that they would not rebuild it as a theatre, but we didn't come to any terms on the sale of it.

Q. Did you have any further conversations with representatives of the Schines prior to May of 1942 in respect to the purchase of those theatres, or, is that the last conversation?

A. Mr. Lee Insley came to see me a couple of times and wanted to lease the two theatres.

The Court: Who was he?

The Witness: He was a representative or an employee of Schine.

Mr. McClennen: I ask to have that last stricken out.

Mr. Marcus: Your Honor, we have the Schine answers to the interrogatories.

The Court: Insley?

The Witness: Insley.

Mr. Marcus: I am now reading from Schine's answer to interrogatory No. 2, Salisbury, Maryland, booking office, booking pictures for theatres from Washington Exchange, Maryland and Delaware, Lee Insley, Divisional Manager, [fol. 2955] 9-12-38 to date. Under "Duties and authority", Mr. Insley and Mr. Gollner, such duties as are assigned by the executive office."

The Court: Proceed.

Q. Did you have any further conversation prior to May, 1942, with representatives of the Schines?

Mr. McClennen: That is objected to.
The Court: He has answered it.

Q. Just Mr. Insley?
A. Yes, sir.

Q. Will you state what was said by Mr. Insley on those occasions?

Mr. McClennen: Same objection.
The Court: Overruled. Take the first one first.

Q. Yes. Do you recall what Mr. Insley said on the first of those occasions?

A. Why, he said that they were in a better position to run the theatre than we, because they were in a better position to buy pictures.

Q. And what was said on the second occasion, do you recall?

A. No, not exactly.

Mr. Marcus: That is all.

The Court: Any cross?

Mr. McClennen: No cross-examination, if your Honor [fol. 2956] please, and it having now been heard by your Honor we move to strike it out.

The Court: We will let it stand.

THOMAS E. AYRES, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Schilz:

Q. Where is your residence, Mr. Ayres?
A. Seaford, Delaware.

Q. Are you connected with the operation of a motion picture theatre or theatres there?

A. Yes, sir.

Q. How long have you been——

The Court: What is that place?
The Witness: Seaford, S-e-a-f-o-r-d, Delaware.

Q. How long have you been operating the theatres in that locality?

A. Since July, 1933.

Q. Will you state their names?

A. The Palace, Seaford, and the Layton I have been operating since 1941, and Georgetown since 1933.

[fol. 2957] Q. What is the name of the theatre at Georgetown, Mr. Ayres?

A. Sussex Theatre.

Q. How far distant is Georgetown from Seaford?

A. 15 miles.

Q. Is there a theatre located at Milford, Delaware?

A. Yes, sir.

Q. What is the name of that theatre?

A. Plaza.

Q. How far distant is that town from Seaford?

A. 20 miles.

Q. Is there a theatre located at Laurel, Delaware?

A. Yes, sir.

Q. And the name of that theatre, Mr. Ayres?

A. Waller, Schine's Waller.

Q. How far is Laurel from Seaford?

A. Six miles.

Q. Will you state whether or not representatives of the defendant Schine organization have attempted to negotiate with you for the purchase of your theatres at Seaford and at Georgetown?

Mr. McClennen: That is objected to.

The Court: Sustained.

Q. Have the Schines, has any official of the Schine organization attempted to buy your theatres?

[fol. 2958] A. Yes, sir.

Mr. McClennen: That is objected to.

The Court: Sustained.

Q. Have you had any conversations with representatives of the defendant Schine organization, Mr. Ayres?

A. Yes, sir.

Q. When was the first conversation?

A. 1938.

Q. Who was present?

A. Mr. May and Mr. Insley.

Q. And who is Mr. Insley, Mr. Ayres?
A. He is a representative of the Schines.

Mr. McClennen: I ask to have that stricken out.
The Court: Is that the same man?
Mr. McClennen: That is Mr. Insley, who has been described.
Mr. Wright: While you were not here, the answer to the interrogatories was read.
The Court: Strike it out.

Q. Where did the conversation occur?
A. At Seaford.

The Court: With Mr. May and Mr. Insley?
The Witness: Mr. May and Mr. Insley.

Q. Will you state what they said to you and you said?

Mr. McClennen: General objection, if your Honor please.
The Court: Overruled.
[fol. 2959]Q. Go ahead and answer.

A. Well, Mr. May and Mr. Insley approached me on buying the theatre, and I told them I wasn't interested, I didn't want to sell. On several occasions they were there.
Q. Now, in this first conversation was there anything else said?
A. No, nothing in particular, only relative to buying the theatres.
Q. Will you name the theatres that were under consideration at that time?

Mr. McClennen: Just a moment.
The Court: What theatres were they talking about buying?

The Witness: The Palace Theatre, Seaford, and Sussex Theatre, Georgetown.

Q. Were there any terms stated during the conversation?
A. No, sir, not with them at that time.
Q. When did the next conversation occur relative to the purchase of those theatres?
A. Well, during that year Mr. May was there several times in 1938 and 1939, and at different times Mr. Insley would approach me and, of course, the conversation always went on, as it was at first, that I just wasn't interested in selling.

[fol. 2960] Q. When, if you know, did the Schine organization acquire the Waller Theatre at Laurel?

A. 1938, I believe. 1938 or 1939. I am not positive. I most believe it is 1938.

Q. Did representatives of the Schine organization have conversations with you after the acquisition of the Waller Theatre?

A. Yes, sir.

Q. Relative to the purchase of your theatres?

A. Yes, sir.

Q. When did the first conversation occur after they had acquired the Waller Theatre at Laurel?

A. In 1939.

Q. Who was present?

A. Mr. Schine.

Q. J.——

A. J. Myer Schine and Mr. McKay and Mr. May.

Q. State to the Court, Mr. Ayers, what they said at that conversation and what you said.

Mr. McClennen: The same objection.

The Court: Same ruling.

A. Why, of course, it was usually the same conversation, if I was interested in selling they would like to make a deal, and I told them I was not interested, and they wanted to [fol. 2961] know if I would go in partners with them in the theatre——

The Court: What?

The Witness: Take it as a partner with them in the theatre. I told them no, I was not interested. They said they thought it would be more to my profit if I would go in partners with them because they could secure pictures much cheaper than I could, and at the end I would probably make as much money as if I was by myself. I told them I still was not interested.

Q. Did you have any conversation with representatives of the Schine organization following the one you have just related?

A. Well, Mr. McKay was there after that time, and Mr. May was there after that time.

Q. How long afterward?

A. I would not say just how long after, but I would say within two months after that.

Q. Was any one else there to see you after the conversation you have related?

A. Mr. Insley. He has been to see me several times, most every two or three weeks I would see him, because he lived close by, and he would approach the subject.

Q. On the occasion of Mr. Insley's next call on you will [fol. 2962] you relate to the Court what was said by him and what was said by yourself?

Mr. McClennen: That is objected to.

The Court: What time?

Mr. Schilz: Following the conversation the witness has testified to with Mr. Schine.

The Court: He said he talked several times in 1939 about making a deal and buying cheaper. You are talking about a talk with Mr. Insley subsequent to that time. State the substance of the talk.

Mr. McClennen: Same objection.

The Court: Same ruling. Go on.

A. Mr. Insley wanted to know if there was any way it would be possible to make a deal with me. He said it was very foolish not to make a deal, because he says they have Laurel now and very likely, with the buying power they had, they would get the product away from me, and I would finally wind up playing probably independent companies rather than playing the type of pictures that I was already playing. I told them I still would have to take that chance, I still was not interested.

Q. Tell the Court what was said on the occasion Mr. May called on you.

A. Mr. May, the last time he was there, was in—he asked [fol. 2963] me if I would not reconsider my thought of making a deal, and sell to him, and I told him no, at that time I had started to build a second theatre, Layton.

The Court: At Seaford?

The Witness: I told him no, I had started to build the second house and I was going through with it. He said, well, they would take that house over in connection with the Palace, and if I would make a deal with them. I told him no, I would not consider it.

Q. Was anything else said?

A. I don't recall of anything at that time with Mr. May. That was the substance of the conversation.

Q. Did you play the picture "Gone With The Wind" in your theatre in Seaford?

A. Yes, sir.

Q. By what company was that picture released and supplied to you?

A. Metro.

Q. Do you recall the season?

A. 1940.

Q. Will you relate to the Court your experience with that picture?

Mr. McClennen: That is objected to.

The Court: He may state the facts. It must be confined [fol. 2964] to acts in connection with the defendants. What happened to him in connection with the theatre is very broad. I will let him state. Go ahead.

Q. Go ahead.

A. The experience we had with "Gone With The Wind," I understood it was going to be released. I went to Washington to see Mr. Berger.

Q. Who is Mr. Berger?

A. District Manager of Metro.

Mr. McClennen: I renew my objection, if your Honor please. There is nothing in the specifications that this could possibly bear on.

The Court: I don't know what the specifications are or the interrogatories.

Mr. Schilz: Do you desire an offer of proof?

The Court: Counsel stated it is not covered by your stipulation. Also nothing in the answers to the interrogatories.

Mr. McClennen: Either the answers to the interrogatories or the stipulation. This which is now proposed, I think, is not within any provision of the specification or answers to interrogatories.

Mr. Schilz: If I may make an offer of proof——

[fol. 2965] The Court: What are the answers that relate to the Seaford situation?

Mr. Wright: As I recall, the town of Seaford is named as one of those with respect to which proof would be offered, and Mr. Ayres was also named as a witness. I don't suppose anything further than that is necessary, by way of specification.

The Court: Seaford?

Mr. Wright: As I recall it, Seaford is mentioned in the first or supplemental bill of particulars.

Mr. Schilz: It is also mentioned in the answer to interrogatories furnished to the defendants.

Mr. McClennen: There is no question that Seaford is mentioned, but nothing of this sort. The allegations are that Schine attempted to acquire the Palace Theatre by the methods described in the complaint.

The Court: Which is the Palace?

Mr. McClennen: That is the witness's theatre, but has nothing to do with the question now put to the witness. We have not objected on the specification ground to his stating.

Mr. Schilz: If your Honor please, what we propose to show is the difficulty this witness had in procuring this pic-
[fol. 2966] ture because of the opposition of the competing Schine houses.

The Court: Showing at the Palace, you mean?

Mr. Schilz: The Schine house at Milford was in a competitive position with the theatres operated by Mr. Ayres at Seaford.

The Court: The Palace Theatre, is that the name——

The Witness: Palace is the name.

The Court: Objection overruled.

By Mr. Schilz:

Q. After you called on Mr. Berger what happened?

Mr. McClennen: That is objected to.

The Court: Overruled. With respect to this picture, you are asking now?

Mr. Schilz: In connection with the picture "Gone With The Wind."

A. I talked with Mr. Berger and he says that——

Mr. McClennen: Just a moment. This was after the talk with Mr. Berger?

The Court: This is the talk with Mr. Berger.

Mr. McClennen: The question was after the talk with Mr. Berger.

Mr. Schilz: Mr. McClennen, I will withdraw my question and ask what was said to Mr. Berger and what he said to you?

[fol. 2967] Mr. McClennen: This is objected to.

The Court: Overruled.

Q. Go ahead and state.

A. I asked Mr. Berger if we could book the picture, after I found Wilmington was playing the picture, knowing we played ten days after Wilmington. He said, "No, we are not going to release the picture to the smaller towns, other than Wilmington and Salisbury." So I took it for granted that is what was going to be done with the picture and would not play the picture.

I came back home, and it came out in our weekly newspaper that the Plaza Theatre at Milford was advertising the picture to play. I immediately called Mr. Berger back on the telephone and asked him how it was Milford was playing, being all the other towns had always played pictures together down there, like Harrington, Dover, Milford, Georgetown and Seaford. He said "They have it booked and we don't feel your town can play the picture." So I could not get anything from Mr. Berger. So I immediately went to New York to see Mr. Rodgers. Mr. Rodgers was not in.

Q. Who is Mr. Rodgers?

A. W. F. Rodgers. He is the——

Q. Connected with what company?

A. Metro. I don't know just what his office is. He is [fol. 2968] more than district manager.

Q. Then what did you do?

A. He was not in his office and they told me to go to see Mr. Tom O'Connors. I went and took the matter up with him. He said there was nothing he could do about it, and I had quite a conversation with him, asking him why we could not get the picture. He said it was due to print shortage.

Mr. McClennen: Is this within your Honor's ruling? This is going on into a great many conversations. I want to be sure our objection is understood to apply to all of it.

The Court: It is not in connection with my ruling—is it Connors?

The Witness: O'Connors.

Q. Is it O'Connors or Connors?

The Court: He may answer.

Q. What happened?

A. He said there was nothing he could do because of the print shortage.

The Court: What?

The Witness: He said there was nothing he could do, due to the print shortage, did not have prints. Still I was not satisfied, so I went to Ted O'Shea, and I stated my problem [fol. 2969] to him, and so he said, "Well"——

Mr. McClennen: Same objection.

Q. Continue.

A. He said he would see what he could do. I told him Milford had it dated and explained the situation to him down in that part of the country, how the roads were so close by the towns, that it would be quite a loss to us to let Milford play the picture without us playing it. Immediately he called Mr. Lynch, Schine booker, and asked him about the picture, and asked him if they would take the picture out. He said no, it was impossible to do, because they had tickets sold on the picture. Then he tried to get a print for us, if there was a print available anywhere. He could not get one. So I came back home with the intentions of not playing the picture. About a week later Mr. Berger called me from Metro and told me he had a print I could have for Seaford. This was starting a week later than Milford. Of course, in small towns, we like to give our people what they want, so I agreed to play the picture, and which I did, and took a bad loss by playing the picture.

Mr. McClennen: May this be stricken?

The Court: The last part may go out as not responsive [fol. 2970] to the question.

By Mr. Schilz:

Q. Mr. Ayres, how long after the picture, "Gone With The Wind," was played at Milford did you play it?

A. I played it a week later.

Q. Directing your attention to the fall of 1939 and your conversations with Mr. Insley and Mr. May, do you recall what, if anything, was said relative to the construction of a theatre in Seaford?

A. Yes. At one conversation I had with Mr. Insley he said that they had bought a lot in Seaford, with the intention to build a theatre, and so I said, "If they have, I can't help it." He said, "Well, if I were you I would sell the theatres to Schine because they are going to build a theatre there and, naturally, they are going to get the product."

He said, "Where are you going to be?" I said, "I will still be here, as far as I know."

Mr. Schilz: That is all.

Cross-examination.

By Mr. McClennen:

Q. That was before you built the Layton Theatre?
A. Yes, sir.

The Court: What did you call that last theatre?
The Witness: L-a-y-t-o-n.
Mr. McClennen: That is all.

[fol. 2971] HUBERT P. WALLACE resumed the stand in behalf of the Plaintiff, having been previously sworn, was examined and testified further as follows:

Cross-examination (continued).

By Mr. McClennen:

Q. When your cross-examination was suspended this morning you had described the outside looks of the Strand in June, 1941. Did you go into the strand at that time?
A. No, sir.
Q. When, before that, had you been inside the Strand?
A. When it was operating in 1940.
Q. And when next were you inside the Strand?
A. I might have been there a little later in 1940.
Q. When next were you inside the Strand?
A. Possibly in 1941.
Q. What time in 1941?
A. Oh, some time in February.
Q. What was the condition of the inside of the Strand at that time?
A. Why, I would describe the condition of the Strand Theatre as fair.
Q. Did you attend a show there at that time?
A. Yes, sir.
[fol. 2972] Q. At that time did you know that the RKO-Schine interests had acquired a lease of the Empire?
A. No, I did not.
Q. When did you first learn of that acquisition?
A. Why, I think I read an article in the newspaper.

Q. When?

A. Some time in either January, February or March. I can't place the time definitely. It may have been in the summer time, but it was some time prior to September in 1941 that I read an article in the Syracuse Herald.

Q. At that time when you learned of that acquisition had you already had any negotiations with Mr. Falk about acquiring a lease of the Strand?

A. No.

Q. When first did you have any negotiations with Mr. Falk?

A. I think the first serious negotiations—first meeting we had was some time in September.

Q. Of 1941?

A. Fore part of September of 1941.

Q. Where did that meeting take place?

A. In the office of Charles Carr, in the Empire Theatre Building. It had a different name, but the Empire Theatre was located in the same building where Carr's office was located.

Q. The Empire Theatre?

[fol. 2973] A. Located in the same building where Charles and Clinton Carr's office, the law office of Charles and Clinton Carr is located. It is a theatre and an office building, combination.

Q. That was an accidental relation; you were not at the Empire Theatre?

A. No, I just described it as the Empire Theatre Building, for want of a better description of it.

Q. That, you say, was some time in September, 1941?

A. Early part of September, to the best of my recollection.

Q. Up to that time had you taken any steps toward getting any product, moving picture product, or other material for exhibition at the Strand?

A. I very specifically stated that I——

Q. Not what you have stated. I have asked you a question.

A. I did not get it.

Mr. McClennen: Read the question.

(Question read.)

Q. That is up to the time——

A. What time?

Q. —of your talk with Mr. Falk in September, 1941.

A. No.

Q. You have described a conversation that you had with Mr. Smith, a salesman for RKO. Was that conversation after you had negotiated with Mr. Falk?

A. That conversation was on September 11th.

[fol. 2974] Q. What I asked you was whether that was after you had negotiated with Mr. Falk?

A. September 11th would be after I had negotiated with Mr. Falk, yes, sir.

Q. That is, your negotiation with Mr. Falk was somewhere between the 1st and 11th of September?

A. That is correct, sir.

Q. You fix the date of that conversation by some definite fact, do you?

A. Which conversation?

Q. The one with Mr. Smith?

A. Yes, sir.

Q. Did you make a memorandum of it at the time?

A. I did.

Q. And was that memorandum made out on the 11th day of September, 1941?

A. Yes, sir, it was.

Q. And while that conversation was going on, did Mr. Smith call Mr. Lux at the Warner Theatre office in Albany?

A. Yes, sir.

Q. Was the call made in your presence?

A. In my presence and in our office.

Q. And about what time of day of September 11th, 1941?

A. Well, that is pinning me down pretty closely, but the recollection is fairly closely, I would say some time between [fol. 2975] and 3 and 3:30 in the afternoon.

Q. Of September 11th, 1941?

A. Yes, sir.

Q. And you remember that the call was to the Warner Theatre office in Albany?

A. In Albany.

Q. And on September 11th, 1941, you talked with Mr. Lux over the line to the Warner Theatre office in Albany?

A. Yes, sir.

Q. Did you ever have any other telephone conversation with Mr. Lux at near or about this time?

A. Yes, I had quite a number.

Q. You had no other on the Strand subject with Mr. Lux before September 11th, 1941, had you?

A. I could not answer to that.

Q. Do you remember any?

A. I don't remember.

Q. Did you make any memoranda of any?

A. I did not.

Q. How soon after this conversation did you have your next telephone conversation with Mr. Lux?

A. I think the next conversation with Mr. Lux, I may have talked to him on the 18th of September.

Q. Do you remember any conversation by telephone with Mr. Lux other than this one before the 18th of September, [fol. 2976] 1941?

A. I remember there were at least 25 or 30 phone calls that afternoon, and to state specifically that I talked to a certain individual at a certain time it is impossible for me to do so.

Q. That is, those phone calls were on the 11th of September, 1941?

A. Yes, sir.

Q. Well, didn't you make a memorandum of your talk with Mr. Lux?

A. Not of all the phone calls, I made a memorandum of the result of the phone calls.

Q. You didn't make any memorandum of your phone call with Mr. Lux?

A. No, but I believe I can——

Q. Just a moment, all I wanted to know was just that. And then the large number of phone calls that you had with other people on the 11th of February, 1941, does not stand in the way of your telling me whether you had another telephone conversation with Mr. Lux before September 18th, 1941, does it?

A. I don't quite understand that question.

Q. Well, then, I won't press you with it, but I will ask you again whether you had any telephone conversation with Mr. Lux between the 11th of September, 1941 and [fol. 2977] the 18th of September, 1941?

A. It is possible that I may have had.

Q. Do you remember any?

A. I don't remember definitely.

Q. Do you remember indefinitely any?

A. Not indefinitely.

Q. Where did you telephone Mr. Lux on the 18th of September, 1941?

A. I didn't telephone Mr. Lux on September 18th, 1941.

Q. Did he telephone you?

A. He telephoned me.

Q. Where did he telephone you from?

A. I presume it was from Buffalo. That is only a presumption on my part.

Q. Did you ever have, as far as you can recall, any telephone conversation other than the one which you have described with Mr. Lux when he was at the Warner Theatre office in Albany?

A. I may have had.

Q. Do you remember any?

A. I can't place them definitely.

Q. Can you place them indefinitely?

A. I cannot.

Q. You haven't the slightest recollection of ever having any other than one telephone conversation with Mr. Lux [fol. 2978] at the Warner Theatre office in Albany?

A. What is that?

The Court: Is that the only talk you had with Mr. Lux in Albany?

A. I may have had a number of talks. That is the only one I can definitely place, because the time element was important there in booking the pictures.

Mr. Wright: I don't know, if the Court please, what significance counsel attaches to where Mr. Lux was at the time. It is entirely immaterial, so far as our case is concerned.

Mr. McClennen: I think it may be immaterial so far as your case is concerned. It is quite material for ours.

The Court: Proceed.

Q. Then so far as your memory serves you, you cannot state you at any time, other than the one you have described, had a telephone call or conversation with Mr. Lux at the Warner Theatre office at Albany?

A. I said I can't remember with certainty of any phone calls.

Q. And you can't remember even with uncertainty, can you?

A. I don't understand the implication.

The Court: Have you any recollection of any?

The Witness: I don't have any definite recollection. I [fol. 2979] won't testify to the fact unless I have a definite recollection of some incident that sets it out particularly in my mind.

Q. The question is whether you have any recollection; that is the only recollection you have?

A. That is the only one I recall among the 30 phone calls that day, because of its particular importance.

The Court: That is quite definite then.

By Mr. McClennen:

Q. This conversation with Mr. Smith was the first conversation that you had had with any of the major film company salesmen with reference to product for the Strand, was it not?

A. Well, I couldn't say it was the first, there were a number of concurrent conversations that same day.

Q. Do you remember any others before the one with Mr. Smith?

A. I don't know whether they were before or after. I place the day and not the order of conversations.

Q. Now, with what other major film company salesmen did you have any conversation on the same day that you had this conversation with Mr. Smith that you have described?

A. I talked with Mr. Phil. Fox, the Branch Manager of Columbia.

Q. On that same day?

A. On that same day.

[fol. 2980] Q. What other?

A. I talked with Mr. Samson, of Fox Film Pictures, on the same day.

Q. What other?

A. Now, it may have been a day after or——

Q. I don't want any day after, I want to know on that day.

A. Well, reliance on my memory will end there, that on that particular day those people I talked to.

Q. Now, do you remember whether on that day you saw Mr. Fox before your conversation with Mr. Smith?

A. No, I don't.

Q. Do you remember whether you had your conversation with Mr. Fox before that conversation with Mr. Smith?

A. No, I don't.

Q. Was the conversation that you had with Mr. Smith, in the course of which you talked with Mr. Lux at the Warner Theatre office in Albany, on the same day that Mr. Carr signed these five sheets marked Exhibit 819?

A. No.

The Court: Is "No" your answer?

The Witness: No.

Q. Was the conversation before the day on which you signed Exhibit 819 or Mr. Carr signed Exhibit 819?

A. Yes, sir.

Mr. Wright: I didn't hear the answer.

[fol. 2981] The Court: Yes.

Q. How many days after the conversation was it before Mr. Carr signed Exhibit 819?

A. I couldn't say definitely.

Q. Well, how many days is the best recollection that you have?

A. Oh, several.

Q. Several days?

A. Yes, sir.

Q. Was this Exhibit 819 signed by Mr. Carr before you got the telegram that was shown to you in your direct-examination?

A. What telegram is that?

Q. Exhibit 820 for identification, which I show you?

A. Certainly there would be no point in signing it after that.

Q. I am not asking you for a discussion, I am asking you whether it was before you got this telegram that this was signed?

A. Yes, sir.

Q. That is, 819 was signed before you received the telegram 820 for identification?

A. Yes, sir.

Q. How long before?

A. Four or five days probably.

[fol. 2982] Q. This telegram, Exhibit 820 for identification, was received by you on September 18th, 1941, was it not?

A. Yes, sir.

Q. So that according to the best recollection this Exhibit 819 was signed on September 13th or 14th, 1941, was it?

A. Or 15th.

Q. Or 15th?

A. Yes, sir.

Q. Or possibly the 16th?

A. Possibly.

Q. Do you remember the day of the week on which Exhibit 819 was signed by Mr. Carr?

A. Which is Exhibit 819?

Q. It is this group of papers that I have just shown you.

A. No, I don't know the day of the week.

Q. Were you present when Mr. Carr signed it?

A. I did,—I was there at the time he signed it.

Q. Now, you are positive, are you, that Exhibit 819 was not signed on the same day as the conversation with Mr. Smith that you described?

A. I am positive of that.

Q. I call your attention to this testimony of yours on page 2820, starting here:

"Q. When was that?

A. On September 11th.

[fol. 2983] Q. That was before you opened?

A. Yes, sir.

Q. What was the conversation you had with him?

A. I asked Mr. Smith for some first-run pictures, or some second-run pictures, and I said 'There are about six or eight pictures unplayed by Schine, which have aged considerably, they are considerably beyond the average playing time; can I get them?' He said, 'I think you can.' We negotiated a deal and signed contracts for five pictures.

Q. Have you got those contracts?

A. Well, they are over there (indicating papers on desk).

Mr. Wright: I will ask to have this group of documents stapled together marked with the next plaintiff's Exhibit number for identification."

And they are identified as Plaintiff's Exhibit No. 819, and Mr. Wright questioned you:

"Q. I will hand you this Plaintiff's Exhibit 819 for identification, and ask you if those are the docu-

ments that you signed at that time that you refer to as contracts or copies of them?

A. These are copies of the contracts that were signed in my presence."

[fol. 2984] A. You understand the implication of these—I said these are copies of contracts.

Q. I wasn't asking you, I was just calling your attention to that testimony to see whether you recall having given that testimony?

A. I do.

Q. Now I call your attention to the same page, 2821:

"Q. Then after these documents here were signed, did you hear anything, or what further conversation did you have with respect to them?

A. What further conversation did I have with whom?

Q. With whoever the salesman was.

A. Mr. Smith?

Q. Mr. Smith.

A. Mr. Smith, after the contracts were signed by 'Carr', called up Elmer Lux.

Q. Who was Elmer Lux?

A. Branch Manager of R. K. O. Radio Pictures Corporation.

Q. What Exchange or Branch?

A. At the R. K. O. Exchange.

Q. Was this call made in your presence?

A. It was made in my presence.

Q. And where was Lux reached, do you know?

A. Reached at the office of Warner's Theatre in Albany."

[fol. 2985] Now, isn't it the fact that the conversation with Mr. Lux at Albany was after Exhibit 819 had been signed in your presence by Mr. Carr?

A. The conversation with Mr. ——

Q. No, no, just that.

A. Will you repeat the question, please?

Mr. McClennen: Read it, please.

(Question read.)

The Witness: I think the application was signed several days later.

Q. That is you now think that the applications had not been signed?

A. There are two separate pieces of paper, one is a deal sheet that was signed and the other is an application under a formal contract.

Q. Now, you think that the contract, Exhibit 819, had not been signed until after you talked by telephone with Mr. Lux at the Warner Theatre office in Albany?

A. That is correct.

Q. So that the conversation with Mr. Lux did not occur until after the 14th of September, 1941, is that correct?

A. No, that is not correct.

Q. On what date did it occur?

A. That conversation occurred with Mr. Lux on September 11th.

Q. And the contracts were signed by Mr. Carr in your [fol. 2986] presence four or five days before September 18th?

A. Yes, sir.

Q. So that the conversation with Mr. Lux occurred when he was at the Warner Theatre office in Albany before the contracts, the Exhibit 819, was signed?

A. Yes, we worked from a deal sheet. I was confused.

Q. When were you confused?

A. As to the contracts and the deal sheet,

Q. Well, at what time were you confused about that?

A. Just now.

Q. When did that confusion come over you?

A. When did the confusion come over me?

Q. That was the question?

A. Just suddenly.

Q. Just suddenly, this afternoon?

A. Just this afternoon, yes, sir.

Q. Now, the pictures were not dated in by you with Mr. Smith until after Exhibit 819 had been signed, were they?

A. Pictures were dated in on September 11th.

Q. That is, the pictures were dated in before Exhibit 819 was signed?

A. Correct.

Q. That is, Mr. Smith dated up pictures with you before he even got a signed application, is that it?

A. No, we had a deal sheet, and it was confirmed over the [fol. 2987] telephone.

Q. Never mind about the deal sheet, and the confirmation, just the simple questions. Mr. Smith,—you dated up the pictures with Mr. Smith before you signed, or there was any contract signed?

A. There was an oral——

Q. No, no, don't mind about the oral.

A. I can't answer that question.

The Court: Did you date them up before this contract was signed?

The Witness: This particular contract, yes, your Honor, I dated the pictures prior to this contract signing.

Q. Now, there was nothing in writing, signed by you, before this dating of the pictures that you have described took place, is that correct?

A. I could answer that if I could see that deal sheet over there.

Q. That is, you are pointing to something on counsel's table?

A. Yes, sir.

Q. And are these papers which counsel had handed you the ones to which you refer?

A. Yes, on the back is——

Q. Just a moment, I haven't asked you about the back [fol. 2988] of them yet; I haven't even got to the front of them yet,

A. What was the question, please?

The Court: You have answered the question.

Q. You have answered the question. Now, when by the calendar do you say that Mr. Smith and you dated up the pictures?

A. September 11th.

Q. And what were the dates that you made at that time with Mr. Smith on September 11th, 1941, the name of the picture and the date?

A. On September—the name of the picture—dated for September 20th and 23rd are "Jungle Cavalcade" and "Flying down to Rio." The name of the pictures dated for September 24th and 26th is "They Met in Argentine" and "Hurry, Charlie Hurry." The name of the pictures for the 27th and 30th is "They Meet Again" and "Reluctant Dragon."

Q. Those datings are on September 11th?

A. Yes, sir.

Q. 1941?

A. Yes, sir.

Q. Are the papers that you have before you in your handwriting?

A. This is a piece of paper on R. K. O. stationery, and this is Mr. Smith's handwriting.

Q. Then the simple answer is that they are not in your [fol. 2989] handwriting?

A. Here is a notation, if you will look here——

Q. I just want to have you tell me whether anything on there is in your handwriting?

A. Some notations here are in my handwriting, but the bulk of the writing is Mr. Smith's. This is Mr. Smith's, and you can compare it.

Q. No, I wasn't asking you about instructing me as to how to find out about it.

A. I beg your pardon.

Q. Now, you know that both of these papers were written by Mr. Smith on September 11th, 1941, do you?

A. Pardon me, this piece of paper was written by Mr. Smith on September 11th, 1941, specifying prices, titles, and so forth.

Mr. Wright: Why not have those marked?

Mr. McClennen: Just before you go on, I will ask to have that marked for identification.

(Thereupon document referred to was marked as Defendants' Exhibit D-114 for identification.)

The Witness: This piece of paper on R. K. O. stationery, most of it was written by me, but the date was put in by Mr. Smith, and there were several other dates added by [fol. 2990] Mr. Smith in conformity with the titles set out there after he talked on the phone that day.

Mr. McClennen: I will ask to have the second sheet marked for identification as Defendants' Exhibit 115.

(Thereupon document referred to was marked as Defendants' Exhibit D-115 for identification.)

Q. Now, on Exhibit for identification D-114, the first words on the sheet are "First-run"; in whose handwriting is that?

A. Mr. Smith's.

Q. The next is "Saint's Vacation 6/6-200."

A. That is Mr. Smith's.

Q. That is all in Mr. Smith's handwriting, and the figure of 6/6 was what?

A. That indicates that on June 6th that picture was passed up by the Schine Keith, so on and so on corporation, and this is the price, $200, at which it was offered to me.

Q. You mean passed up before it was released, do you?

A. Oh, I didn't say that.

Q. I know you didn't.

A. I said this was the date the picture was passed up.

Q. And this does not indicate the date of release, does it, [fol. 2991] 6/6?

A. It might be passed up the date it was released.

Q. The fact is that 6/6 is not the release date, is it?

A. No.

Q. And the next item "They Meet Again, 7/11-200," that is in Mr. Smith's handwriting?

A. Yes, sir.

Q. And the 7/11 indicates the release date, does it not?

A. No, sir.

Q. On what date was it released?

A. If you will hand me those records I can give you the exact date.

Q. I haven't the records, but if any one who has them will give them to me I will give them to the witness.

Mr. Wright: Do you want the R. K. O. Release Schedule?

The Witness: No, I would like to have a general release schedule. I can find them.

Mr. Wright: You mean a schedule of pictures you played at your theatre?

The Witness: No, a general release schedule of 1939-40 and 1940-41 of the exhibitors.

Q. There is an R. K. O. Release Schedule in evidence, is there not?

Mr. McClennen: I want the thing that the witness wants.

The Witness: May I get it, your Honor, to save time? [fol. 2992] The Court: You may step down there.

The Witness: Thank you.

The Court: Is there anything you can proceed with pending the production of this paper, it is half-past three now.

[fol. 2993] Q. The next item is "Hurry, Charlie, Hurry," 7/25-200. Is that all in Mr. Smith's handwriting?

A. Yes, sir.

Q. Was "Hurry, Charlie, Hurry" released on July 25, 1941?

A. I could not say.

Q. The next is "Flying Down to Rio—200." Was that in Mr. Smith's handwriting?

A. Yes, sir.

Q. There is no date on the paper against that?

A. No, sir.

Q. The first three items have a line drawn below them. Does that mean that those above that line were the first-run pictures?

A. First-run pictures, yes, sir.

Q. And those below were subsequent run or second-run, or something other than first-run?

A. They were something other than first-run.

Q. The next is "Six"——

A. "Six-Gun Gold."

Q. "Six-Gun Gold." Nothing is carried out against that. Then comes a line and a word "Second-run." The next under that is "They Met In Argentina," and against that the word "Now," or do you read it something else?

A. I don't know what that is.

Q. Against that $100?

[fol. 2994] A. $100.

Q. The next is "Reluctant Dragon," clearly with the word "Now"?

A. "Now."

Q. And against that $200?

A. $200, yes, sir.

Q. That "Now" means that that picture was immediately available?

A. That is correct. This indicates when those pictures were available, and that indicates "Now," because it is past the first-run, and it is a current second-run, meaning it is available immediately or now.

Q. Now, the next is the item "Reluctant Dragon" and against that "Now" and $200?

A. That is right.

Q. In Mr. Smith's handwriting?

A. Yes, sir.

Q. And the "Now" indicated that that was then available?

A. That is correct.

Q. And "Jungle Cavalcade" has against it a cross and an "O.K." and then "9/28-$150"?

A. Yes; sir.

Q. That "9/28" after the "x-O.K." meant that it would became available on September 28?

A. That is correct.

[fol. 2995] Q. The next was "Snowwhite" and against that "25%" and over in the margin a thousand. Is that all in Mr. Smith's handwriting?

A. Yes.

Q. Is the circle around the "thousand" in his hand?

A. It is.

Q. And the circle was put there to indicate that that was dropped out of the deal?

A. No. That is 25% against a split over $1,000, with a minimum admission charge of 25 cents. Those were the stipulations of playing this particular picture.

Q. What was the circle for?

A. That indicated the split over $1,000. That is the way——

Q. The circle indicated that?

A. Yes, sir. Just the same as some people write "Split one-half," and other people write it some other way.

Q. Did you take up that picture?

A. We did not.

Q. The next is "4 Academy" and then a line. Is there anything against that——

A. Nothing.

Q. —by way of price? You opened on what date?

A. 20th of September, 1941.

Q. What did you open with for pictures?

A. Could I see that schedule of our bookings, please? [fol. 2996] We opened with "Jungle Cavalcade" and "Flying Down to Rio."

Q. Those two pictures were booked by you with Mr. Smith on September 11th?

A. Yes, sir.

Q. 1941?

A. That is correct.

Q. And those were the pictures that on September 11, 1941, you wanted to open with?

A. No, sir.

Q. You did not want to open with them?

A. No.

Q. When did you first decide to open with them?

A. We decided to open with them when we found that prints on these other first-run pictures were not immediately available, and we could not get an answer on the 11th.

Q. That is, on the 11th you could get no answer as to whether "Hurry, Charley, Hurry" and "They Meet Again" would be available for your opening?

A. Not for the opening. They were available, but we could not get a print. There is a distinction.

Q. How old were those pictures?

The Court: Which two do you mean, the ones he did not get?

Mr. McClennen: No, the two that he booked on the 11th of September.

A. May I see that, please, and I can tell you? "Flying [fol. 2997] Down to Rio" is a reissue. That is one that you referred to, and "Jungle Cavalcade" is a travel picture, and it was not available, "Jungle Cavalcade," until 9/28. You see those dates on both sheets of paper. Now, here is where a 'phone conversation came in and I can place it (referring to document).

Q. Just a moment. What were the pictures that on September 11, 1941, you booked with Mr. Smith?

A. I booked——

The Court: For the opening date, you mean?

Q. For the opening date.

A. I booked "Jungle Cavalcade" and "Flying Down to Rio."

Q. On the 11th of September, 1941?

A. Yes, sir.

The Court: For the opening date?

The Witness: Yes, sir.

The Court: That is what you got?

The Witness: That is what we got. I attempted to book other pictures, but that is what I eventually got.

The Court: That is what you booked for that date and that is what you got for that date?

The Witness: Yes, your Honor.

Q. You say that is what you eventually got, and that eventual-ity occurred the 11th of September, 1941, did [fol. 2998] it not?

A. Yes, sir.

Q. Did you ever change the bookings of any of the pictures which you booked on September 11, 1941?

A. Yes, sir.

Q. Which, by name, did you change the bookings of?

A. "Hurry, Charlie, Hurry" and "They Met in Argentina" was booked for September 24-26. Instead I played "Bowery Blitzkrieg" and "Caught in the Act." On September 27-30 I booked "They Meet Again" and "Reluctant Dragon" and I played "Father Steps Out" and "Gentleman from Dixie."

Q. You booked "Hurry, Charlie, Hurry" and "They Meet Again" for a definite date before you found out whether the prints were available, did you?

A. The prints were available for those dates, but not for the opening date.

Q. When did you learn that they were available for those days?

A. On September 11.

Q. Well, then, just what was it that you did not know about on September 11th, about whether prints would be available?

A. Just what was it that I did not know about on September 11?

Q. You have told us just now that you did not book those [fol. 2999] others, "Hurry, Charlie, Hurry" and "They Meet Again" because——

A. The prints were not——

The Court: Just a moment. Listen to his question.

Q. Because it was not known on that day, September 11, 1941, whether they were available?

A. The physical properties, the films, were not available for those particular days. The bookings of the picture—the picture was accessible itself but the physical property, that is, the film; they did not have a print of the picture for September 20-23.

Q. That is, Mr. Smith, on September 11, 1941, told you that the prints of those pictures would not be available to you on the opening date which you proposed, isn't that correct?

A. They were available—I am trying to get this distinction with the minimum disturbance. The pictures were available; the prints were not available. The physical properties themselves were not available.

The Court: By "physical properties"——

The Witness: I mean the actual film itself. The picture, the license itself was available. The picture was available, but the print itself was not available. They had no print.

[fol. 3000] The Court: What is the picture in distinction from the film?

The Witness: The copyrighted product they sell under contract.

The Court: If you got the film that is all you would need?

The Witness: Yes, but that is the trouble. The point was there that he raised, the pictures were not available. I say the pictures were available but the prints were not available.

The Court: I still don't—why would you book them? You booked them for another date than the opening date. The prints were not available but the films were available?

The Witness: No, the prints of a picture, a certain picture, like "Gone With The Wind"——

The Court: You mean the advertisement?

The Witness: The playing restriction. We come within the playing restriction time. In other words, he sold me the picture and it was available, for example, as of September 20th. The picture itself was available but the physical property of the film, they did not have a print in the house to serve me.

By Mr. McClennen:

Q. Well, now, would you tell me, with a minimum of dis-[fol. 3001] turbance, whether when you got to the end of that conversation you were aware that for some reason, those two pictures, "Hurry, Charlie, Hurry," and "They Meet Again" were not going to be available for showing at the Strand Theatre at your opening on September 20, 1941?

A. They had no prints for the pictures.

The Court: If you knew that?

The Witness: I knew that, due to a 'phone conversation.

Q. That is, you knew before the end of September 11, 1941, that you were not going to get those pictures on your opening night?

A. That is correct.

Q. And you learned that fact after a telephone conversation which you had with Mr. Lux at the Warner Theatre office in Albany, is that true?

A. No, sir.

Q. You learned that fact before that conversation?

A. We learned that fact——

Q. No, no, just——

A. —after that conversation.

Q. How soon after that conversation with Mr. Lux which you had, when he was at the Warner Theatre office in Albany, on September 11, 1941, how soon after did you learn that the prints would not be available for your opening night?

[fol. 3002] A. About two hours afterward.

Q. About two hours after the conversation?

A. About two hours after the conversation with Mr. Lux in Albany.

Q. That is, when you talked with Mr. Lux in Albany he did not tell you that those pictures would be available for that opening night?

A. Yes, sir, he did say so. He, in fact, told me to call Buffalo to get a print.

Q. Did you call Buffalo on September 11, 1941?

A. Mr. Smith called Buffalo.

Q. What?

A. Mr. Smith called Buffalo.

Q. On September 11, 1941?

A. Yes, sir.

Q. Mr. Smith told you, after calling Buffalo, that the picture would not be available for you on September 20, 1941?

Mr. Wright: Which picture is being referred to?

Mr. McClennen: "Hurry, Charlie, Hurry" and "They Meet Again.

A. No, he did not tell me. I talked to the booker on the 'phone himself, got that information direct.

Q. After you had got the information from the booker by the end of September 11, 1941, you knew that you were [fol. 3003] not going to get those two pictures for your opening performance?

A. Which two pictures?

Q. "Hurry, Charlie, Hurry" and "They Meet Again"?

A. I knew on September 11th we were not going to get the pictures for the opening performance—on September 11th.

Q. On September 11th?

A. After talking with Buffalo.

Q. And after you had talked with Mr. Lux at the Warner office in Albany on September 11, 1941?

A. No, that is not so.

Q. You called the booker before you called Mr. Lux?

A. I called the booker after I talked with Mr. Lux.

Q. After you had talked with Mr. Lux and after you had talked with the booker it was that you learned definitely that you were not going to get the pictures for the opening night?

A. That is correct.

Q. Now, then, this difficulty here, this failure to get "They Meet Again" and "Hurry, Charlie, Hurry" did not postpone your opening plan at all, did it?

A. No, sir.

Q. It had no effect in that direction?

A. It had the effect of causing us to spend more money [fol. 3004] for a new front, new advertising, and a general disruption of the routine of trying to open the theatre.

Q. The new front was one of those temporary kinds that you put on?

A. Yes, sir.

Q. When did you erect that front?

A. They started to build that front—oh, I should say September 5th, the rough framework for it.

Q. When did they get it done?

A. I imagine the background and all the rough work was finished about September 10th.

Q. Was anything more done to that front after September 10, 1941?

A. There was.

Q. What was next done to it?

A. Well, in anticipation of getting those two pictures, we had the sign painter put the titles of the pictures on them.

Q. Which two pictures?

A. "Hurry, Charlie, Hurry" and "They Meet Again."

Q. Did he also put on the dates?

A. No.

Q. When did he put on "Hurry, Charlie, Hurry" and "They Meet Again"?

A. I think after I had the first conversation with Mr. [fol. 3005] Smith I telephoned the sign painter and had him start to work on it.

Q. Was that one of your numerous conversations on the 11th of September?

A. Pardon?

Q. Was that one of your numerous conversations on the 11th of September, 1941?

A. That was.

Q. So that on the 11th of September, 1941, you told the sign painter to put "Hurry, Charlie, Hurry" and "They Meet Again" on the front, did you?

A. Yes, sir.

Q. How soon did he get it on?

A. I don't know.

Q. Approximately?

A. Oh, it was probably finished in two or three days.

Q. So that by the 14th or 15th of September you had "Hurry, Charlie, Hurry" and "They Meet Again" all advertised on your front, is that it?

A. We had those five—we had five pictures advertised on the front and the sides.

Q. That will help me putting a later question later, but among those five you had "Hurry, Charlie, Hurry" and "They Meet Again"?

A. Yes, sir.

[fol. 3006] Q. On that front?

A. Yes, sir.

Q. It was on that front by the 15th of September, 1941?

A. Yes, sir.

Q. That is, you had put it on your front before you signed any application for the pictures, is that correct?

A. Do you mean these documents?

Q. No, I mean any application.

A. I did not sign anything.

Q. Well, then, it was put on there before you signed any application or anybody else signed any application?

A. That is correct.

Q. All five pictures were put up on your front by the 15th of September, 1941?

A. Not on the front. On the front and the sides.

Q. Were they all five put on the same front or side or some of them on the front and some on the side?

A. Some were put on the front and some were put on the sides. They are large three-sheet boards, and the front is a built-up front.

Mr. Wright: It seems to me an awful lot of time is being spent on something that has no conceivable relation to the issues we are trying here.

The Court: Oh, no, I think it is very pertinent.

Mr. Wright: As to the details of when the sign—what [fol. 3007] difference does it make?

The Court: I suppose the contention of the Government is that he had those pictures for a certain date and did not get them.

Mr. Wright: There isn't any question about the fact he had them for a certain date and did not get them. What was done with the side or what was done with the front, as far as I can see, would not have the slightest bearing on that fact. The fundamental fact that he booked them and did not get them. What he did with the sign is purely incidental.

The Court: No.

Q. Which of the pictures were put on the front before or by September 15, 1941?

A. I think there was a picture, a three-sheet of "They Meet Again" and I believe there was a picture of "Hurry, Charlie, Hurry."

Q. They were put on the front?

A. Yes.

Q. Where were "Flying Down to Rio" and your other opening pictures put?

A. They were on three-sheet boards on the Salina Street side.

[fol. 3008] Q. That is, you did not give front position to the pictures that you were going to open with when you set this up?

A. It was necessary, after we found we could not get the pictures to repaint the boards and put the other titles on?

The Court: You said you knew on the 11th of September that you could not get these pictures for the opening date?

The Witness: But I had already ordered the sign painter to build a false front on those other two pictures, on the expectation I would get them, when I learned that——

The Court: You did not have that expectation before the 11th, did you?

The Witness: I did.

The Court: Proceed.

By Mr. McClennen:

Q. Does it lie in your mind on what that expectation was based?

A. Pardon?

Q. You said before the 11th you had an expectation of getting those pictures and I asked you if it lay in your mind on what that expectation was based?

A. On a conversation with Mr. Smith.

Q. What was the date of that conversation?

[fol. 3009] A. I think it was on the 10th or possibly on the 9th.

Q. The 10th or the 9th. This testimony so far that your first conversation about these pictures was on September 11th is all wrong, is it?

A. No.

Q. You think it was the 9th of September that you got the expectation that you were going to have "Hurry, Charlie, Hurry" and "They Meet Again"?

A. I just had an informal 'phone call and a talk with Mr. Smith, and he told me what pictures were—had been available for some time, and he thought that we could buy them, but there was never any definite conversation about the price or anything else until September 11.

Q. On the strength of that 'phone conversation you arranged to have these pictures put on your sign?

A. I did.

Q. Was that 'phone conversation with Mr. Smith before or after you sent your telegram of September 9, 1941, desiring to see him?

A. I think it was on the 9th.

Q. Well, now, what pictures, over the telephone, did Mr.

Smith tell you on the 10th that you could have, what pictures did he name on the telephone?

A. He said: There is a number of rejected pictures, [fol. 3010] including "They Meet Again" and "Hurry, Charlie, Hurry."

Q. Did he mention any others?

A. I don't believe he did.

Q. So that it was on the strength of that telephone conversation that you ordered the sign man to put those names on your sign?

A. Yes, sir.

Mr. McClennen: Your Honor, I shall get in trouble with my associates if I talk any longer. Can we adjourn now? It is 4 o'clock.

The Court: We have been a long time with this witness. I don't know.

Mr. Wright: We would like to finish with him today.

Mr. McClennen: It is not possible.

Mr. Wright: We have been holding Mr. Boumansour from Malone, New York. He was the one I wanted to put on today and Counsel was not agreeable to going ahead with him and we have told him we would be through with him on Monday.

Mr. McClennen: We cannot possibly finish.

The Court: 11 o'clock Monday, then. We will have to finish with both of these witnesses Monday.

Mr. McClennen: Until 11 o'clock on Monday?

The Court: We will start 11 o'clock Monday morning. [fols. 3011-3013] I think we can finish with your other man Monday as well.

Mr. Wright: I sincerely hope so. I have given him that assurance.

The Court: We will suspend until 11 o'clock Monday.

(Whereupon a recess was taken until Monday, October 16, 1944, at 11 A. M.)

[fol. 3014] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

SCHINE CHAIN THEATRES, INC., et al., Defendants

Continuation of trial before Honorable JOHN KNIGHT, United States District Judge for the Western District of New York, October 16, 1944, 11:30 a. m.

Appearances:

Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Special Assistants to the Attorney General, and Milton Kallis, Esq., Special Attorney, in behalf of the United States.

Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homans, Esq., and Edward M. Antevil, Esq., appearing for the Defendants.

[fol. 3015] HUBERT P. WALLACE resumed the stand by and on behalf of the Plaintiff, having been previously sworn, was examined and testified as follows:

Cross-examination (Continued).

By Mr. McClennen:

Q. Mr. Wallace, at page 2991 you stated that there were among your papers your release schedule. Will you refer to that and tell me the release date of R.K.O.'s "They Meet Again"?

A. On July 11th, 1941.

Q. And R.K.O.'s "Hurry, Charlie, Hurry"?

A. July 25th, 1941.

Q. And R.K.O.'s "Saint's Vacation"?

A. June 6th, 1941.

Q. And that was the significance of those three dates on this Defendant's Exhibit D-114, was it not?

A. It appears to be.

Q. Did you do any newspaper advertising in Syracuse before you opened the Strand on September 20th, 1941?

A. Yes, sir.

Q. In that newspaper advertising you did not mention "They Meet Again" or "Hurry, Charlie, Hurry", did you?
A. No, sir.

[fol. 3016] Mr. McClennen: Will you mark this photostat of a Syracuse newspaper for identification?

(Thereupon photostat of Syracuse newspaper referred to was marked as Defendants' Exhibit D-116 for identification.)

Q. Can you tell me whether this advertisement occurring in the Post Standard, Syracuse, New York, Thursday, September 18th, 1941, is your first newspaper advertisement?
A. I could not definitely say that it was the first, but I know that is our newspaper advertisement.
Q. The picture there advertised, or the pictures there advertised were the first ones that you played on opening, were they not?
A. Those are the two pictures we played to open the theatre, yes, sir.

Mr. McClennen: I offer the document, Exhibit D-116 for identification in evidence.
Mr. Wright: No objection.

(Thereupon Defendants' Exhibit D-116 for identification was received in evidence.)

The Court: What is the date of the opening in September?
Mr. McClennen: The 20th, I think it was.
Mr. Wright: The 20th.
[fol. 3017] Q. What were your admission prices for that opening night?
A. I am not sure, but to the best of my knowledge they were either 20 or 25 cents.
Q. Would you give me the Empire's admission prices at that time?
A. No, I couldn't.
Q. And to refresh your recollection, I show you Exhibit No. 116.
A. The admission prices at the Empire were 55 cents, $1.10, $1.65, $2.20 and $2.75.

The Court: Is that for the opening date only?
Mr. McClennen: That is the admission price at the Empire at that time that ad appeared in the newspaper.

Mr. Wright: I think it should be pointed out that the attraction there was not a picture; that, I believe, was a legitimate production.

Mr. McClennen: That is correct.

Q. At page 2832 you were asked this question? "After you received this telegram that is marked Plaintiff's Exhibit 820 for identification, did you actually receive an approved copy or the document here which has on it the title 'They Meet Again,' and a document with the title 'Hurry, Charlie, Hurry'? A. We did."

Mr. Wright: As I recall, there was an objection to that [fol. 3018] question and the answer was stricken out, wasn't it *not*? I do not think he was permitted to answer that question.

Mr. McClennen: Well, he did answer it, and the objection came after that, and I believe that——

Mr. Wright: It was stricken out.

Mr. McClennen: I am telling you what I believe. That the Court struck it out. The stenographer's page does not show that strike out. We will understand, shall we, that it was stricken out, as my understanding at the time the objection was made?

Mr. Wright: I did not hear the answer. I understood that whatever the answer was, it has been stricken out.

Mr. McClennen: Then we understand that was stricken.

Q. Will you produce the contract referred to in that question, which I just read you?

A. You mean the——

Q. An approved contract for "They Meet Again" and "Hurry, Charlie, Hurry."

A. I can't produce an approved contract.

Q. There never was received by you an approved contract for those two pictures, was there?

A. I think there was.

[fol. 3019] Q. Have you looked for it?

A. I have.

Q. And you can't find it?

A. All the papers of the Strand Theatre were taken by Mr. Carr, and I called it to the Government's attention to get a subpoena so that I could get those papers. I didn't get them, and I don't think they got them.

Q. That contract, to which did that refer?

Mr. Wright: If the Court please, he is now examining on testimony, as I understand it, that actually wasn't part of the direct examination.

The Court: He states he has no contract, but he believes there was a contract.

Mr. Wright: Yes, but I don't see how this is proper cross-examination, if he wants to go into another issue as his direct-examination stands; there is no claim made that he had approved contracts.

The Court: No what?

Mr. Wright: No claim, as his direct-examination stands, that he had approved contracts in his possession, as I understand it.

The Court: I understood the question to inquire into the proceeding as to what was done during those days. He [fol. 3020] now states he believes he did have a written contract.

Q. The written contract which you have not been able to find, as you will recall it, was a contract which included "Hurry, Charlie, Hurry," "They Meet Again" and several other pictures that you had discussed with Mr. Smith?

A. Those pictures you refer to, and the ones I refer to, were on that yellow sheet we had here, an exhibit that we had here, not the deal sheet, the application.

Q. You are referring in your last answer to the five documents which are Plaintiff's Exhibit 819 in evidence?

A. Yes, sir.

Q. And when do you recall receiving that approved contract for "They Meet Again" and "Hurry, Charlie, Hurry".

A. To the best of my recollection, the contracts came in some time after the pictures were taken out, and that would be after September 18th.

Q. So that when the approved contract came in, you had already been advised that those pictures were not to be included?

A. Those two pictures, "Hurry, Charlie, Hurry" and "They Meet Again."

Q. And on Exhibit 819 you wrote the word "Canceled" on the sheet for "Hurry, Charlie, Hurry," and on the sheet for "They Meet Again"?

[fol. 3021] A. Yes, sir, I wrote that.

Q. When did you write that?

A. I can't recall just when I wrote that. I know I wrote that.

Q. Did you write it in September, 1941?

A. I don't know. I can't give you a truthful answer to that. It could have been some time when we took the files apart in December, and it may have been some time prior to that. It may have been in September, but I knew the pictures were canceled. When we checked the contracts over to file the contracts away, I wrote "Canceled" on those two, because we were checking off what we had paid for pictures.

Q. Where did you file away those contracts?

A. Those contracts——

Q. That is, for the whole five pictures?

A. Those contracts were filed in a file at the office of the Strand Theatre.

Q. What was done with this Exhibit 819?

A. That Exhibit 819, I think, was either on the desk or in my drawer, because—I don't know, it got mixed up. That exhibit and that deal sheet were together among the few papers that I had at the Strand Theatre.

Q. You don't remember when you found those sheets in the drawer of your desk?

[fol. 3022] A. I do remember that.

Q. What was the date on which you found them in the drawer of your desk?

A. When I made preparations to leave the theatre, I was going through my desk, and I picked up that deal sheet and that document there and a few other things, and took them with me.

Q. That would be in the early part of——

A. January.

Q. January?

A. Probably the middle of January.

Q. Middle of January, 1942?

A. Yes, sir.

Q. When you took them away at that time, did those two sheets of Exhibit 819 have the word "Canceled" on them in your handwriting?

A. Yes, sir.

Q. With those facts, would it not accord with your recollection that you put "Canceled" on there about September 18, 1941?

A. I did not hear the last part.

(Last question read.)

A. No, that would not improve my recollection any.

Q. Do you recall whether, when you picked them out of the drawer in January, 1942, you wrote "Canceled" on [fol. 3023] those two?

A. I did not write it on at that time.

Q. Have you ever written it on since that time?

A. Since January?

Q. Yes.

A. 1942? No, sir.

Q. Had you had these sheets in use—I am referring to Exhibit 819—at any time between somewhere around the middle of September, 1941, and January, 1942?

A. I did.

Q. These particular sheets?

A. Those particular sheets.

Q. Do you remember whose name was signed in approval on those contracts?

A. No, sir.

Q. Now, on October 7, 1941, you signed an application for other R.K.O. pictures, which I show you, did you not?

A. Yes, sir.

Mr. McClennen: I will offer that in evidence.

Mr. Wright: No objection.

(Thereupon application for R.K.O. pictures, dated October 7, 1941, referred to received in evidence and marked as Defendants' Exhibit D-117.)

Q. On that same day you signed an application for [fol. 3024] another R. K. O. picture, which I show you?

A. Yes, sir.

Mr. McClennen: I will offer that in evidence.

Mr. Wright: No objection.

(Thereupon application for R.K.O. picture, dated October 7, 1941, referred to, was received in evidence and marked as Defendants' Exhibit D-118.)

Q. Both exhibits D-117 and D-118 bear the approval signature of Ned E. Depinet. Apparently a stamped signature. That was the usual form of approval that you received on approved contracts for R.K.O. pictures?

A. Where there was an approved contract sent in, as a rule, there was a stamp on there for signature.

Q. The signature of Ned E. Depinet?

A. Pardon?

Q. And the signature of Ned E. Depinet, stamped signature of Ned E. Depinet?

A. On most contracts they just stamped the signature on it, and occasionally, I guess, they wrote them in.

Q. The signature they stamped on was that of Ned E. Depinet?

A. On those contracts, yes, sir.

Q. And on the contracts of R.K.O. which you received generally?

A. Well, I don't know, generally. Of course, sometimes when there is a change of officers in the corporation, there is [fol. 3025] a change of signature.

Q. You know R.K.O. well enough to know that Mr. Depinet has occupied that position for years, do you not?

A. Well, I couldn't swear to that.

Q. You don't remember any contracts signed by R.K.O. in approval by anybody except Ned E. Depinet, do you?

A. I have three news reel contracts here, and they are all signed by Ned E. Depinet the same way.

Q. You did not play at the Strand all the R.K.O. pictures for which you received approved contracts, did you?

A. No, sir.

Q. And subsequently R.K.O. brought a suit against you for non-performance of those contracts, namely, against the Syracuse Community Theatre Corporation?

A. I don't know anything about that.

Q. You never heard of it?

A. Never heard of it.

Mr. McClennen: Mark this for identficaton, please.

(Thereupon document with reference to suit of R.K.O. against Syracuse Community Theatre Corporation, referred to, was marked as Defendants' Exhibit D-119 for identification.)

Q. Did you not hear, referring to Exhibit D-119 for identification, that judgment had been entered in favor of R.K.O. for over $1600 for the non-performance of those [fol. 3026] contracts?

A. This is the first I have heard of it.

Mr. McClennen: Mark this, please.

(Thereupon, copy of letter dated October 16, 1941 from R.K.O. to Mr. Wallace, referred to, was marked as Defendant's Exhibit D-120 for identification.)

Q. Did you receive the original of a letter from Elmer Lux; dated October 16, 1941, in the substance of defendants' identification Exhibit D-120?

A. I did.

Mr. McClennen: I offer that in evidence.

The Court: What is the date of that?

Mr. McClennen: October 16, 1941.

(Thereupon Defendants' Exhibit No. D-120 previously marked for identification was received in evidence.)

Mr. McClennen: Exhibit D-120 reads "October 16th, 1941. Special Delivery.

Mr. Harry Wallace, Strand Theatre, Syracuse, New York.

DEAR HARRY:

Will appreciate immediate word from you as to certain passes you are handing out. In fact, several local Syracuse [fol. 3027] exhibitors advise the city is flooded with 5-cent passes on which they are allegedly absorbing the tax which results in an actual 2-cent admission. Will appreciate details by return mail as most Syracuse accounts have already pulled my play dates on 'Tom, Dick & Harry.'

Sincerely, R.K.O. Radio Pictures, Inc., Branch Manager."

Q. Did you write any reply to that letter?

A. I may have.

Q. Had you issued 5-cent passes at that time?

A. Not with my authorization.

Q. Had it been done by the theatre?

A. Done by the manager of the theatre.

Q. With the provision that they would absorb the tax?

A. I wouldn't say as to the provision, I would assume the substance of that letter is correct.

Q. Now, do you remember whether after that date any distributor's salesmen solicited you for the sale of pictures at the Strand?

A. Yes, sir, I do.

Q. After October 16th, 1941, which salesman for what distributor solicited you to buy pictures for the Strand?

[fol. 3028] A. Mr. Marcus, of Columbia, and Mr. Hartman of the United Artists, and I think it was about that time that Mr. Rosineau of Paramount called on me.

Q. Well, after October 16th, 1941?

A. I think it was about that time; it may have been a day or so before, or might have been a little after, I am not positive, but I know definitely Mr. Hartman called on me in November, and I can place the date of the Columbia solicitation because we did get our picture in January, 1942, and I think that was sold to me in December.

Q. After October 16th, 1941, did any other salesman for any distributor call upon you and solicit your purchase of pictures for the Strand?

A. No, I don't think so. I don't think they did, other than the three I mentioned. I may be wrong on that, but I don't think so.

Mr. McClennen: I offer in evidence the judgment memoranda now Defendants' Exhibit 119 for identification.

Mr. Wright: Well, this is objected to, if the Court please. I don't see what issue that is admissible on. It appeared long after any of the events we are dealing with here.

Mr. McClennen: The judgment did, but the non-performance of the contract was in the period with which we [fol. 3029] are dealing.

Mr. Wright: It hasn't been shown that there was any non-performance during this period or that non-performance of a contract was given by any distributor's representative as a reason for not dealing with this theatre, or not offering pictures.

The Court: I suppose the proof could be made otherwise of the judgment.

Mr. Wright: It has to be tied up.

The Court: The contract would be on file.

Mr. Wright: Assuming there was later a judgment taken, and the contract was not performed, I don't see how that is at all relevant to the refusal of the distributor to deal prior to the time there was non-performance. There hasn't been any showing of that at all. This is after the theatre was closed.

The Court: How is it competent?

Mr. McClennen: The judgment is against the corporation which was the contracting party. It establishes that there

had been a breach of contract. The distributor R. K. O. was aware of the breach of contract currently. That was sub-
[fol. 3030] sequently established. Now, the non-dealing——

Mr. Wright: May I see that? I did not mean to interrupt, I just want to look at the paper.

The Court: You did not finish your presentment.

Mr. McClennen: We have a case where this company, this Community Theatre by Mr. Wallace is pointing out something about the dealing or nondealing with R.K.O. R.K.O., of course, was currently aware of the non-performance of the contract. The actual non-performance is shown by the judgment, and it is one of the facts of the situation that would naturally lead to not providing any more pictures.

Mr. Wright: If the Court please, the date of this judgment is October 8th, 1942. Now, this paper does not establish any non-performance of any contract whatsoever, prior to the time that that theatre closed in January, 1942.

The Court: When does it state the contract was made for the pictures which it is claimed was in default?

Mr. McClennen: October 7th, 1941.

Mr. Wright: Does not appear from this paper.

[fol. 3031] The Court: Those pictures it is claimed he did not take up.

Mr. McClennen: The pictures he did not take up.

The Court: That was in October?

Mr. McClennen: October 7th, 1941.

The Court: The witness can state; does it appear now whether those pictures were played or not?

Mr. Wright: Let him call the witness' attention to the contract he says was in default.

The Court: Does it appear?

Mr. McClennen: He has testified, I think, already, that there were some that were not played.

The Court: Well, that is as far as you need go, isn't it? He has testified some were not played.

Mr. Wright: There is nothing to connect any that were not played with this judgment here.

The Court: I have sustained the objection on that.

By Mr. McClennen:

Q. From page 2841 to 2846 you have given the pictures which you did play, and I haven't checked it, but I am told

that it does not include the names appearing on Exhibits D-117 and 118.

Mr. Wright: If the Court please, these contracts say these pictures were bought as available. It hasn't been shown yet that those pictures were ever available to him [fol. 3032] during the period the theatre was open.

The Court: There is no question before the Court that I know of now.

Q. In the course of the fall of 1941, was "Virgin Bride" and "School For Husbands" played at the Strand?

A. Yes, sir.

Q. Was "Headleys At Home" played at the Strand?

A. Yes, sir.

Q. Those are not dated in your testimony giving what was played at Page 2841 to 46; it was an error omitting those, was it not?

A. No, I could not state unless I saw the list that was made up. Mr. Wright, I have the original play-off sheet there, right over in that file on that table. I could give him that information.

Mr. Wright: Here is your list of bookings.

The Witness: I have the original play-off that this is copied from.

Mr. McClennen: Mr. Wright has shown the witness Plaintiff's Exhibit 816 for identification.

By Mr. McClennen:

Q. In your testimony at page 2841 to 2846, it was in error, your omitting "Virgin Bride" and "School for Husbands" and "Headleys at Home", was it not?

[fol. 3033] A. I have a notation here "Headleys at Home".

Q. On what dates?

A. For November 5th, 6th and 7th, and as to those other two pictures, you mentioned——

Q. "Virgin Bride" and "School for Husbands".

A. The theatre was leased to a firm in New York for a flat rental of $1500 for one week, and those were the pictures they played, and that is why it does not appear in my schedule here. It was leased to a firm—I don't recall the name, but it was leased to a firm—I have the record of it downstairs—it was leased to a New York firm. It was

some kind of an exploitation picture, but frankly, it was an objectionable picture from the viewpoint of the public, and we did not want to have anything to do with it. We leased the theatre for that week.

The Court: You did not want to have anything to do with it, but you leased it to somebody else to do it, is that the idea?

The Witness: It was a controversial picture, and we had nothing else to play, and rather than have it closed and take a loss of $2,000, we did lease it for $1500 for that week, and as a result there was a great deal of criticism doing it. I think we did wrong in leasing it.

[fol. 3034] Q. That picture or those pictures "Virgin Bride" and "School for Husbands" played there from November 1st to November 11, 1941, did they not?

A. That may be true, I don't know. I would not say. I know it played a full week. I know we received—I took a check to Governor Schoenick for $1500 for deposit, and it was held in escrow. That is why I recollect——

Q. That was $1500 income that came in to you from the theatre?

A. From the people—the sub-lessee for that one week.

Q. You knew of the advertisements at the time of the playing of those pictures?

A. Yes, I was very much aware of the advertisements.

Q. And I show you a photostat of a newspaper, which I will ask to have marked for identification.

(Thereupon photostat of newspaper containing advertisements, referred to, was marked as Defendants' Exhibit D-121 for identification.)

Q. Do you recognize this as the advertisement of that picture?

A. I do.

Q. You did not make any arrangement to have the advertisements show that you were not playing the picture, did you?

A. Well, sir, I don't understand that. The advertise-[fol. 3035] ments and the whole thing was run by this fellow when he leased the theatre for that period, and he paid the bill to the Post Standard and Syracuse Herald, and everything was separate. There was nothing charged to our account on any advertising of any nature. It was

his obligation to pay it. I did not make any arrangement with him about advertising.

Q. It made an impression on your mind at the time, the running of this picture at the Strand, did it not?

A. Yes, sir.

Q. Now, on page 2842, you say "From October 29th, to November 1st, we played "Man of Conquest" and "Secrets of a Model". "Then what did you play"?

"A. Then 'Secrets of a Model' was held over from November 1st, through November 7th."

You meant by that expression that it did not play in that period, November 1st to November 7th?

A. No, "Secrets of a Model"—they were both so-called sex pictures. This is the picture I had reference to, right here.

Q. The next question is: "Q. Was anything played with it during that period?"

"A. No, on November 8th, the Theatre was closed."

That period, from November 1st to November 7th was part of the period during which "Virgin Bride" [fol. 3036] and "School for Husbands" was played in that theatre?

A. Yes, sir.

Q. It was not closed in that period?

A. From November 1st to November 7th, this New York firm operated not "Secrets of a Model", but these two so-called sex pictures "Virgin Bride" and "School for Husbands".

Q. Did you play at the Strand in the fall of 1941 Abe Lyman and his Californians, plus other acts on the screen, "Top Sergeant Mulligan"?

Mr. Wright: What was the date?

Q. Look at November 28th to 30th.

A. Yes, sir, we played Abe Lyman's Band on November 28th, 29th and 30th, and on the screen that same time we played "Top Sergeant Mulligan", that is correct.

Q. The omission of that in your testimony at pages 2841 to 2846 was an error, was it not?

Mr. Wright: If the Court please, on page 2843 he testified on November 28th through November 30th, he played "Sergeant Mulligan" and "Hurricane Smith".

Mr. McClennen: I see that I have made an error. I was led into it by looking at Plaintiff's Exhibit 816 for identification. It was an error in putting in those pictures on [fol. 3037] that page other than "Top Sergeant Mulligan".

The Witness: Yes, sir. Here is the original booking sheet. That is where this is copied from. It was copied in a hurry, of course. There is "Abe Lyman", and it is a stage show, and here is "Top Sergeant Mulligan", and those are the dates.

The Court: We can't hear what you say. I don't know whether the stenographer got it in the record or not.

Mr. McClennen: I will repeat——

The Court: That is his answer. I could not hear what he said. Strike it out. There was no question put to him. You are reciting the reason for your statement.

By Mr. McClennen:

Q. Your card which you have just shown me shows that from the 28th of November, 1941, to the 30th of November, 1941, you played "Top Sergeant Mulligan" and "An Ache In Every"——

A. I think that is "An Ache In Every Steak".

Q. "College Songs C. S. No. 3-6-6" and "City Within a City" and "Whose Zoo in Hollywood" in color?

A. That is correct.

The Court: You played those between those dates, between October 28th and November——

[fol. 3038] The Witness: No, your Honor. Those were all played on November 28th, 29th and 30th. Isn't that the question?

Mr. McClennen: Yes.

By Mr. McClennen:

Q. Now, on your identification, Exhibit 816, except for "Sergeant Mulligan" none of those are mentioned, are they?

A. This is a list of feature pictures and all of these are short subjects, single reels.

Q. None of them are mentioned?

A. This is a list of feature pictures, and "An Ache in Every Steak", "College Songs", "Community Sing", "A City Within a City" and "Whose Zoo in Hollywood" are all short subjects, not features.

Q. None of them are mentioned on your list Exhibit 816 for identification?

A. No, sir.

Q. You did not intend in your answers at pages 2841 to 2846 to state the other attractions which you showed at the Strand, did you?

A. You mean the stage attractions?

Q. Stage attractions, or anything except the feature picture?

A. I presumed that is all you wanted.

[fol. 3039] Q. I wasn't the one who asked the questions.

A. I beg your pardon?

Q. I asked, you did not intend to give anything in your list except feature pictures; that is a true statement?

A. I may have given the stage shows in that list. I think I did. I am not sure. If I can see that testimony I could tell you which was a stage show and which was a feature picture.

(A document was handed to witness by Mr. Wright.)

The Witness: Those are all the feature pictures.

Q. Except the "Virgin Bride" and——

A. With the exception of "Virgin Bride" and something about husbands.

Q. "School for Husbands" and "Headleys at Home"?

A. Yes, sir. I have it wrong. I have "Secrets of Model" there.

Q. Now, I show you pages 2841 to 46.

A. I made a mark on there (referring to another document).

Q. (Continuing)) Just run down and see whether in there there is anything except the features and, if you find anything on those pages just mention it, otherwise say there was nothing but the features.

The Court: I understood him to say he only stated the features with the possible exception of some stage show.

[fol. 3040] Mr. McClennen: I want to see whether he did mention any stage show or any other attraction than features or feature pictures.

The Witness: Well, on here it say—on November 8th the theatre was closed and on November 20th through the 24th, we played "Spooks Run Wild" and a stage show. That stage show would be "McFarr and Van." I didn't specify what the stage show was, I just generalized and said it was a stage show, but I can give you the names of the stage shows on those dates.

Q. On September 29th do you have—or on September 30th, did you have Bingo as one of the attractions?

A. I could not state specifically, but I know we started Bingo there. You see, we——

Q. Well, all I am asking you, you did start Bingo when?

A. Some time around the latter part of September or around October, but I could place it with the communication I had with the police department concerning Bingo games.

Q. Do you remember how many Bingo nights you had in the fall of 1941?

A. Either one or two.

Q. At some time did you have Louis Primer and other acts, that is, in the fall of 1941?

[fol. 3041] The Court: Have what did you say?

Q. Louis Pri*nter* plus other acts?

The Court: A picture, you mean?

Mr. McClennen: No, this was, I imagine, a stage show. I was going to develop that.

The Witness: We had this band, Louis Primer and four other acts on December 5, 6 and 7.

Q. Then on December 10th, 1941, did you have "Blonde from Singapore," and "I Killed That Man"?

A. December 10th?

Q. December 10th?

A. I can tell the date on that. We had "Blonde From Singapore" on January 1 through January 6th.

Q. Then you didn't have them on December 10th?

A. No, sir.

Q. Is that a picture?

A. "Blonde From Singapore"?

Q. Yes.

A. Yes.

Q. And did you on December 10th have "I Killed That Man"?

A. No, sir.

Q. Did you at any time in the fall of 1941, or in January, 1941, show "I Killed That Man."?

A. Can I look at that list?

(List handed to witness.)

[fol. 3042] The Witness: (Continuing) No, I believe that picture played at the Paramount Theatre as a single feature or at the Empire Theatre, I am not sure.

Q. On December 12th, 1941, and the following two days, did you have Tommy Tucker's Band and other acts?

A. December 12th, 13th and 14th, we had Tommy Tucker and his Band and three other acts.

Q. On December 18th to 21st, did you have an Earl Carroll show?

A. "Earl Carroll's Vanities" played—no,—I have Earl Carroll's Vanities here, and I think I am almost certain on it, I am sure this is correct, it was December, 19th, 20th and 21st.

Q. 19th, 20th and 21st?

A. Yes, sir.

Q. Did you at some time show "Glen Gray" and the Loma Orchestra plus "Three Sailors" and other acts?

A. Glen Gray played at the Strand Theatre from December 25th, 26th, 27th and 28th. There is no record of any act, it is just Glen Gray and his orchestra, and I assume that he had some other acts with him, but there are no acts that we paid.

Q. From December 31st to January 6th, did you have "Powder and Lipstick Review" featuring the "Three Stooges"?

[fol. 3043] A. December 31st to January 6th we had "The Powder and Lipstick Review," which was a separate unit, and as an additional attraction there was the "Three Stooges." They were booked separately and did not appear in the same act. They were an entirely separate act.

The Court: We will suspend at this time until 2 o'clock.

(Whereupon a recess was taken until 2 o'clock P. M.)

[fol. 3044] After recess, 2 o'clock P. M.

Appearances: As before noted.

HUBERT P. WALLACE resumed by and on behalf of the Plaintiff, testified further as follows:

Cross-examination (continued).

By Mr. McClennen:

Q. During January, 1942, on ten or eleven days in the aggregate, in addition to the exhibitions which I have already mentioned to you, did you have Dick Rogers and Orchestra, with Del Rios and other acts, Carl Hoff and Band, with other acts, and on the screen "Riot Squad," and a stage show "Hawaiian Nights" featuring Princess Luna, Don Feats Orchestra and other acts?

Mr. Wright: What was the date?

Mr. McClennen: About ten days in the aggregate in January, 1942?

The Witness: From December 31st to January 6th we played "Powder and Lipstick Revue," and "The Three Stooges," and we played the pictures "Blonde From Singapore."

On January 8th, 9th and 10th, we played "Dangerous [fol. 3045] Lady," that is, the picture attraction, and Dick Rogers and Orchestra besides several acts that he had with him.

Q. Will you proceed to deal with Carl Hoff and Band?

A. After——

Q. After January 11th, possibly, specifically, January 17th.

A. On January 16th, 17th and 18th, we played Carl Hoff and his Orchestra and some acts that went with the orchestra, and the screen attraction—could I see that list, please? I got these cards mixed up so here that I just can't place it.

Q. I suggest for the stage Show "Hawaiian Nights," you look at January 22nd to 25th.

A. That was January 16th to 18th, Carl Hoff and Orchestra, and on the screen we had "Riot Squad," as a screen attraction feature, and then—what is that other date?

Q. Stage show "Hawaiian Nights" and other attractions, January 22nd to January 25th.

A. January 22nd, 23rd and 24th and 25th we had the stage attraction Hawaiian Nights and a screen attraction for those same days "Borrowed Hero," a Monogram Picture.

Q. Referring to Exhibit 819, the five applications, I ask you considerately whether it is not the fact that you received contracts—approved contracts for three of those; [fol. 3046] that is, "Tom, Dick and Harry"—"They Met in Argentina"—and "Reluctant Dragon," and did not receive approved contracts for "They Meet Again" and "Hurry, Charlie, Hurry"?

A. Well, there is a possibility that we did not have approved contracts, but to the best of my recollection I think we received approved contracts on this whole group of pictures. I think that "They Meet Again"—"Hurry, Charlie, Hurry"—there was seven pictures involved. There was the two that we opened with. I think we received—can I have that list again, please? (Referring to document.) There were contracts on "Jungle Cavalcade" and "Flying Down to Rio" in addition to these. I do not see the contracts on "Jungle Cavalcade"——

Q. Isn't that just the fact, that you have now mentioned seven pictures, and that what you received contracts for were three of the five that are in the Exhibit 819 for identification and two others, and no contract for "Hurry, Charlie, Hurry" and "They Meet Again"? Isn't that the fact?

A. I can't say that is a fact, no, sir.

Q. And you cannot say from your recollection that it is not the fact?

A. No, sir.

Q. Did you observe whether "Hurry, Charlie, Hurry" [fol. 3047] and "They Meet Again" played in Syracuse that fall?

A. Why I think they played. I can't give you the exact date, but I know they played there.

Q. They played at the Eckel Theatre?

A. I would not say for sure. They played at one of the Schine-Keith operations. They played at one of those theatres.

Q. It was not at the Empire?

A. I don't think it was at the Empire.

Q. And "Hurry, Charlie, Hurry" may have played October 30th to November 5th, 1941?

A. It may have been played. You mean at the Empire——

Q. Eckel?

A. It may have, yes, sir.

Q. "They Meet Again" on October 1st, or thereabouts, 1941?

The Court: Where do you mean?

Mr. McClennen: At the Eckel.

The Witness: It may have been, yes, sir.

The Court: You claim that your contracts, if any, for those two pictures you are discussing here were for second-run or later run?

The Witness: First-run.

Q. And the Eckel Theatre was a first-run theatre at that time?

A. Yes, sir, it was either first-run or hold-over first-run.

[fol. 3048] Q. Hold-over as you use the expression in the trade is when an operator controlling two theatres plays a picture in one theatre and immediately thereafter moves it to over his other theatre, is that correct?

The Court: Both being first-run houses, you mean?

Mr. McClennen: Both being first-run.

The Witness: With the one distinction, I don't believe that it is necessary to control both theatres with hold-over runs. A hold-over can be run at one theatre owned by one person and can be moved to another first-run in another theatre, but the same conditions, like admission price and so forth, other conditions that prevail, I think, are the same.

Q. Well, now, isn't that the very distinction, that if the picture goes to a theatre in another control, when it gets into that theatre it is a second-run?

A. No. A second-run—distinction as to a second-run is that the protection and clearance is written into a first-run contract usually specifying an interval of thirty days. I don't know of any other instance. I could not say of any other instance, other than thirty days from a first-run to [fol. 3049] a second. A second-run would be an interval of time lapse where the first-run gets that protection so as to divert the greatest amount of money to that first-run situation where they feel the production gets the best revenue.

Q. Well, then, that we may understand, when you speak, if one exhibitor plays a picture after another exhibitor has played it first-run, the second exhibitor is playing it first-run, if there is no interval of time between the two?

A. That is correct. A hold-over is one continuous run, but it would be in a different theatre, but under the same admission scale and under the same general condition such as advertising, desirability of the theatre, and so forth.

By the Court:

Q. At the same time, do you mean?

A. Not concurrently, but there would be no interval. That is where the theory of protection and clearance comes in, that a hold-over is a continuation of a first-run, but at a different locality.

Q. They maintain the same prices?

A. The same prices, that is, the same admission prices would be charged. I think that is one of the conditions, as I understand it, in all hold-overs.

Q. It would be a first-run at the second theatre, but it [fol. 3050] wouldn't be a second-run by another owner?

A. No, a second-run is when the interval of time elapses because time is of the essence in all picture contracts. That is what gives the value, is the time element.

Q. No matter where it continues, if it is a continued first-run, it would make a first-run of it?

A. Yes, but it is designated as a hold-over.

By Mr. McClennen:

Q. Why do you say that the interval of time between the runs is the essence of the contract situation in the moving-picture trade?

A. Because I believe that, and I think every one will agree, that time is essential. For example, a news weekly, if it is current, that is, released as of today, it has a definite value at the box office, and it has a definite value to the exchange. If it is six months old, it has little of any value, but time is of the essence of every picture contract, so that a picture that is made in 1930 doesn't have relatively the value of a picture made currently.

Q. So that in order to get the real best results at the first-run, that the theatre is capable of getting, there must be a sufficient interval of time between the second-run, so that possible patrons won't be dissuaded from going to the [fol. 3051] first-run by the expectation of a run soon in another theatre?

A. I agree with you on that.

Mr. Wright: If the Court please, it is pure argument.

The Court: Well, I think I understand it.

Q. Did you ever happen to know of a picture playing first-run at Loew's Theatre in Syracuse and then playing a hold-over run at the Eckel Theatre in Syracuse?

A. No, sir.

Q. When you used hold-over as a possibility in the Eckel just now, you had reference to a picture that had played first-run in one of the other R.K.O. Schine houses and then moved over immediately to the Eckel?

A. Well, when I had reference to a hold-over at the Eckel, if I had reference to it, if there would be a hold-over at the Eckel Theatre, there would be a unity of ownership between the Eckel Theatre and the Keith or Paramount, or some other of the Schine theatres. I have never——

Q. And——

A. Pardon me. I never can remember of a hold-over between Loew's and any Schine theatre. I can't recall—I can't say that is true, but I can't recall of any.

Q. On October 3rd, 1931——

The Court: '41.

Q. '41, I beg your Honor's pardon, and I refer you to [fol. 3052] Plaintiff's Exhibit 818, you had a conference with Mr. Rowell, the representative of Fox, is that correct?

A. Yes, sir.

Q. And there was before you at that time this Exhibit 818?

A. He handed me——

Mr. Wright: Has the exhibit been taken apart? As I recall, we numbered the three-page exhibit as one exhibit; was it not?

Mr. McClennen: No, there was no——

Mr. Wright: I beg your pardon, I think 818 was one three-page exhibit.

The Witness: No, it wasn't. It was a five-page exhibit, pardon me.

Mr. Wright: Yes, it consisted of these three pages and also had a release schedule attached to it. Apparently it has been taken apart.

Mr. McClennen: Is this the release schedule then? When it came to me this first page was separate.

Mr. Wright: As it was put in evidence they were all attached together.

Mr. McClennen: Then do we understand that Exhibit 818 is this one that has the mark on it, and this one also dated October 3, 1941, signed by Rowell and having on it in black pencil "Ahead of Empire Theatre," and this one [fol. 3053] also signed by Rowell, dated October 3rd, 1941, having on it in black pencil "No run," and this release schedule for 1940-41; that is your understanding?

Mr. Wright: It is clear from the examination that at the time it was introduced the document consisted of three pages and that the release schedule was attached. I took him over each page of the document as to whose handwriting was on each one.

Mr. McClennen: Are we in accord that these three——

The Court: Those were offered by Rowell?

Mr. Wright: Yes, that is right, and the form in which they went in, evidently after they were put in evidence the clip which held the three pages and release schedule together, was torn off. They should be kept together.

Mr. McClennen: Then we now understand these three I have just described, and the release schedule, are part of that exhibit?

Mr. Wright: That is right.

By Mr. McClennen:

Q. Are these exhibits the very papers that Mr. Rowell handed you, or copies of the ones that he handed you?

A. No, sir, those are the very papers he handed me.

[fol. 3054] Q. And was the release schedule hitched to it at that time?

A. Just like they are now.

Q. In whose handwriting, on the second sheet of these, is the black pencil "Ahead of Empire Theatre"?

A. That is in Mr. Rowell's handwriting.

Q. Did he put it on in the course of the interview, or was it on before he arrived?

A. Well, I don't think it was on when he arrived, because when he arrived he had copies. He had left the copy in Buffalo, so he told me, and he brought these copies and gave them to me.

Q. These, by the way, are apparently carbon copies of something?

A. Yes, sir.

Q. Then when he handed them to you first at that interview was the black pencil "650 Bingo from gross" on it?

A. No, sir.

Q. Was the black pencil "50-50 over $1200" on it?

A. No, that was put on later.

Q. This paper on which are the words "Ahead of Empire Theatre" has on it five pictures and those were of the 1941-42 Fox season, were they not?

A. Well, let me see that. This group of pictures, I think, was the first block of five under the consent decree.

Q. And he handed you that with his signature attached to [fol. 3055] that sheet?

A. They were all together and he had his signature on, I think, on all of them. That is his signature there (indicating).

Q. He had his signature on each one of the three separately?

A. I don't know.

Q. Did he not?

A. Let's see, yes, his signature is on all three copies of these.

Q. And that signature was on there at the time he handed them to you?

A. Yes, sir.

Q. Now, in that first interview, October 3, 1941, did you have any talk with Mr. Rowell about Bingo?

A. I did.

Q. And what did you say to him about Bingo?

A. I told him that we were running Bingo and that I—that it would be a necessary part of the contract to put a stipulation in about Bingo.

Q. Was that because some of these pictures were percentage pictures?

A. Yes, sir.

Q. And you were in substance telling him that if you ran percentage pictures on nights when you were having Bingo, that there must be some allowance against the gross for [fol. 3056] the cost of the Bingo operation?

A. That is correct.

Q. And was the $650 which you suggested——

A. Well, can I see that, please?

(Document shown to witness.)

A. (Continuing): I think the $650 is the actual amount of cash we gave away.

Q. You mean you had given away on the preceding Bingo night?

A. Yes, sir.

Q. And did that result in some talk with Mr. Rowell as to a method of meeting your suggestion about the Bingo expense?

A. It did.

Q. And was that conversation that the receipts on the Bingo nights at the box office, in excess of the ordinary admission prices, for that number of admissions, should be excluded from the count when reckoning the percentage?

A. We had a discussion about that, yes, sir.

Q. And was that in the rough the substance of the discussion?

A. Yes, sir.

Q. The other sheet of that date, signed by Mr. Rowell, and on which the exhibit number 818, itself, is written, were for pictures of earlier season's releases, brought back for return plays, because they were special pictures that it was [fol. 3057] thought worth while to exhibit in another season?

A. They were old pictures.

Q. Well, now, it wasn't just because they were old pictures that he had on there "Return engagement specials," was it?

A. That was the designation he placed on it, and we laughed about it at the time.

Q. That is, then, he did designate these as "Return engagement specials" in his conversation with you?

A. Yes, sir.

Q. And he used it in the conversation to point out that he was offering them as distinguishable from an ordinary, old picture?

A. Well, he offered all old pictures. Some of them he designated as "Return engagement specials," with two columns of pictures. Some had no box-office value—right on that page—some had no box-office value, and some I could not even tell you the names of.

Q. You thoroughly understood why he designated these as "Return engagement specials," did you not?

A. That is the title he put on the pictures.

Q. He put it on there, you believed, at the time as a selling feature to distinguish them from the ordinary run of old pictures?

A. Well, the mere fact——

[fol. 3058] Q. Not the mere fact, but did you not so understand?

A. I had a discussion with Mr. Rowell about that.

Q. Now, I asked you if you did not understand that.

The Court: Did the word "special" have any significance?

The Witness: It did not have any significance to me.

Q. You understood that it was used by Mr. Rowell in order to present something significant as a part of his selling discussion?

A. He tried to give me the impression that it was—in other words, he made that special term there as a sales possibility. I did not agree with him, that those return engagement specials were so-called return engagement specials. They were all old pictures.

Q. I was asking you what he presented them to you as. He presented them to you as special pictures, did he not?

The Court: He has answered that. He said he did present them to him.

The Witness: Yes, sir, that is what he presented and that is what he titled them, as "Return engagement specials," and we laughed about it, and I said "Well, every day I hear a new one," or some such words like that, that did not mean anything. These were a group of pictures, your Honor, that were possibly seven or eight or ten years old, five years [fol. 3059] old. They may have had some box-office value, but sometimes an independent exchange will pick up an old picture and advertise it super colossal. That does not—by the very fact that they put that title on it that does not mean that it is what it says it is.

Q. Look at your list of pictures and name me the ones by name that were not in their day conspicuous attractions?

Mr. Wright: If the Court please, there hasn't been any testimony to the effect that those pictures were not conspicuous attractions.

The Court: I don't know the significance of this line of inquiry, except as it is—it would have some bearing, of course, on the type of product he had, that is true.

Mr. McClennen: The purpose which I have in mind, if the testimony bears it out, is that this was an offer legitimate in its character, at proper prices, for conspicuous old pic-

tures that were to come back on return engagement. That is the purpose.

The Court: You mean more value than others as attractions?

Mr. McClennen: Yes.

Mr. Wright: I don't think there is any question about [fol. 3060] that. As I recall his direct testimony, he said over in the left-hand column were pictures he had referred to as proven box-office value, and in the right-hand column it referred to other old pictures at a lower price.

The Court: The point of inquiry is because he says he does not attach any significance to the use of the word "Special."

Mr. Wright: What possible difference could that make, what significance he attached to it? It is perfectly clear what was offered there, certain named pictures in the left-hand column which were evidently thought to have proven box-office value, and at the right-hand column were unnamed old pictures at a lower price.

The Court: Those that have a proven value may have a difference among themselves.

Mr. Wright: That is possible.

Mr. McClennen: In view of Mr. Wright's statement, I don't know that I need press that extensive inquiry any further.

The Court: Very well.

By Mr. McClennen:

[fol. 3061] Q. These pictures on this first page entitled "Return engagement specials" had played in Syracuse long enough ago so that the earlier runs were out of the way, and these would be available for your immediate use?

A. They played many years ago, most of them.

Q. So that they were then available?

A. They could be available immediately.

Q. Then we go to the third page, which has on it in black pencil "No run." Was that on when it was given to you?

A. That is Mr. Rowell's writing, but it was put on before he took it back. He gave it to me first, it was not on there, and after we had a discussion and he clarified it further by putting "No run" on there. That "No run" meant the run after the theatres in Syracuse had finished playing them. It was not a first-run, not a second-run or third-run or subsequent-run. It was no run, but the point is that the

pictures were of 1940-1941 season, and they had practically all played in Syracuse already at the time he offered them to me. There was no restriction as to——

Q. At that time, toward the end of the calendar year 1941 there would hardly be any of the 1941-1942 product available for play if you were to play after the first-run houses or the second-houses and the neighborhood run houses, is that correct?

[fol. 3062] A. That is not correct, sir. I am sorry to disagree with you, but here is dates that are put on there, and these are after the subsequent-run houses, and that is the way he sold me these pictures, and there is where I strenuously objected, that he made a distinction to sell me pictures after the smallest theatres got through with them. There is December 10th. These pictures, most of them, played in August and September, as I recall, and they had worked through their protection and clearance period and had been through the second, and, if they had a third, a third-run, and became available to the little neighborhood houses, and then he put on here the date we could play them.

Mr. Wright: Which page was the witness talking about?

Mr. McClennen: He was talking about the second page of the exhibit.

Mr. Wright: That is the block of five?

Mr. McClennen: That is the block of five of the current season's product.

The Witness: That was the current season's product.

By Mr. McClennen:

Q. That is, he told you that "Charlie's Aunt" would be available for you on October 29th, 1941?

A. Yes, sir.

Q. And "Private Nurse" November 20, 1941?

[fol. 3063] A. Yes, sir.

Q. And "Wild Geese Calling" on December 10, 1941?

A. Yes, sir.

Q. And "Sun Valley Serenade" on December 10, 1941?

A. Yes, sir.

Q. And "Dressed to Kill"—did he you give any availability date on that?

A. Well, he made this restriction.

Q. Did that apply to both of them?

A. That applied to both. They were to be played on the same bill. These two pictures, they had to be played on the same bill.

Q. On that sheet, the second sheet, Exhibit 818, there is written in Mr. Rowell's handwriting "Saturday, Sunday, Monday and Tuesday"?

A. Yes, sir.

Q. Were those the days of the week that those pictures were to play if you took them?

A. If we were allowed to play the pictures at all, it was necessary to play them on Saturday, Sunday, Monday and Tuesday.

Q. What was your plan at that time for your change of feature in the week? How long were you going to play the first section of the week and what days, and how long the second section of the week?

[fol. 3064] A. Well, our playing arrangement was, Saturday, Sunday, Monday and Tuesday, and I would call that the week-end playing time, and the forepart of the week, the playing arrangement was Wednesday, Thursday and Friday. We may have deviated from that, but——

Q. Did you say anything to him as to the nights on which you proposed to play Bingo?

A. Yes, sir.

Q. What nights?

A. I think at that time we were playing Bingo on Thursday nights.

Q. Directing your attention to another matter, was the lease of the Strand, Exhibit 812, referred to at pages 2745 and 2793, signed on the date that it bears? (Handing document to witness.)

A. I don't think I would be competent to swear—say that it was signed on the date it bears. I did not sign it.

Q. Was it signed in your presence?

A. It may have been.

Q. Have you any recollection one way or the other?

A. My recollection is faint, that it was, but there were so many conversations that went on that day. We had a Board of Directors' meeting, and I think this was signed in the presence of Mr. Hornbeck, and I had to go somewhere else, and I called Governor Schoenick and talked with him [fol. 3065] and asked him to have Mr. Hornbeck come over to execute this agreement, because I was not an officer of

the corporation, and I did not think it was necessary for me to be there, anyhow, but it may have been signed in my presence.

Q. That is, the directors' meeting was the directors' meeting of the Syracuse Community Theatre Corporation?

A. Pardon?

Q. The directors' meeting was of the directors of the Syracuse Community Theatre Corporation?

A. The directors' meeting, yes, sir.

Q. And that meeting was held on September 11th, 1941?

A. I assume so.

Q. You spoke of a directors' meeting on September 11th, 1941; and I want to find out whether it was a directors' meeting of that corporation?

A. I think I have the—that is right. Here are the minutes of the corporation on September 11th, 1941.

Q. That was a directors' meeting at which it was voted to make the lease?

A. Well, I think the formal negotiations were completed after that directors' meeting or possibly before, but we certainly had agreed upon the terms—we had a complete meeting of the mind on the various terms as to the lease prior to this directors' meeting. I know we had a number [fol. 3066] of discussions about it.

Q. At the moment, regardless of the meeting of the minds, the directors' meeting of the corporation authorizing this lease was held on the 11th of September, 1941, was it not?

A. Yes, sir, here is a copy of the minutes.

Q. All I have asked you is that.

A. That is right, yes, sir.

Q. I want to direct your attention to Canandaigua. The Jenkins lot which you have mentioned was a lot of a deceased Jenkins, his estate?

A. Yes, sir.

Q. And the persons which you assumed to be the ones interested in the estate were William Jenkins, the son?

A. Yes, sir.

Q. And Mrs. Himes, the daughter?

A. Mrs. Himes.

Q. How is that spelled?

A. H-i-m-e-s.

Q. Mrs. Himes' husband was a lawyer?

A. Yes, sir.

Q. Such negotiations as you had, if any, were with the son Jenkins and the lawyer Himes?

A. Yes, sir.

[fol. 3067] Q. Were they had with the two together?

A. They were had, well, I talked with Mr. Jenkins down at that chemical plant; then I later talked to Mr. Jenkins and Mr. Himes in the chemical plant and I talked to Mr. Himes in his office on the main street, just a little up from the Jenkins' Department Store. I talked to him alone one time.

Q. This Mr. Jenkins was a man of apparently what age, would you say?

A. I would judge he was 35 years old.

Q. And Mr. Himes was how old a man, apparently?

A. Probably 40 years old.

Q. Did you have any dealings with Mrs. Himes?

A. On one occasion Mr. Lauer and I went to Mr. Himes' home and Mrs. Himes sat down and Lauer and I and Mr. Himes and Mrs. Himes had a discussion in his home for about two hours.

Q. Was Mr. Jenkins, the son, present at that time?

A. No, sir, he was not.

Q. I direct your attention to Auburn; on January 1st, 1939, the best theatre in town was the Auburn?

A. Yes, sir.

Q. The second best was the Jefferson?

A. Well, I don't want you to put me in a position to argue about it. My feeling was that the Capitol was equally [fol. 3068] as good as the Jefferson.

Q. Well, with the exception of the Capitol, the next best to the Auburn was the Jefferson?

A. Yes, sir.

Q. And with the same exception, the next best was the Palace?

A. Yes, sir.

Q. And the next best was the Strand?

A. No, sir, the Strand was—in 1939?

Q. January 1, 1949.

A. The Strand, I think, was dismantled in 1939.

Q. By January 1, 1939, it had been dismantled?

A. Well, the building hadn't been torn down, but I understand that it was used for a furniture store-house, and it certainly could not be used as a theatre.

Q. Now, tell me just the respects in which in your judgment as a theatre operator, the Capitol was superior to the Jefferson?

A. I never suggested that the Capitol was superior to the Jefferson, but I believe that in comforts and appointments and general desirability that the theatre certainly — equal standing with the Jefferson Theatre.

Q. Was the Jefferson Theatre on the street floor or above?

A. The Jefferson Theatre was on the street floor.

Q. Did it have a gallery?

[fol. 3069] A. It had a gallery, yes, sir.

Q. And about how many seats did it have?

A. To the best of my recollection it had about 1,000 seats.

Q. And was the Capitol on the street floor?

A. No, sir.

Q. What floor was it on?

A. It was an upstairs—it was on the second floor.

Q. How was it reached?

A. Well you walk up some steps.

Q. And was there a full store area under the theatre?

A. No, not a full store area.

Q. There were stores under the main body of the auditorium of the theatre?

A. Yes, sir.

Q. And the stores completed the street front except for the entrance to the theatre?

A. Yes, sir.

Q. Is this photograph, which I show you, fairly representative of the Capitol on, say, January 1, 1939? I don't mean that it was taken that day, but does it fairly represent the condition then?

A. Well, it might be, but I don't know when we put the glass front on there definitely, but that might be that was fairly representative, I would say, in 1939. I think we put the glass front on the stores, and theatre entrance [fol. 3070] later..

Mr. McClennen: I offer this photograph.

(Photograph handed to and inspected by Mr. Wright.)

Mr. Wright: No objection.

(Thereupon photograph referred to was marked as Defendants' Exhibit D-122 in evidence.)

Q. At page 2759, I read you the transcript of your testimony, as follows:

"Q. After the 1933-34 season, did you have any regular first-run contract with any of the major distributors?

A. I had United Artists, about 30 pictures.

Q. What season was that?

A. That was the 1934-35 season, and I had about, oh, 14 to 16 pictures from R.K.O., and I had roughly a few pictures from Columbia."

Is that correct?

A. I think so.

Q. When you say "a few pictures from Columbia", you are referring to the 1934-35 season?

A. Yes, sir.

Q. And how many did you mean as a few pictures?

A. Two or three or possibly four.

[fol. 3071] Q. That is, for the season 1934-35 you think you had in all four pictures of Columbia?

A. That is the way I figures it, yes, sir.

(Thereupon film contract with Columbia, referred to, was marked as Defendants' Exhibit D-123 for identification.)

Q. I show you Exhibit D-123 for identification; is that your signature?

A. That is my signature, yes, sir.

Mr. McClennen: I offer this in evidence.

Mr. Wright: Is that one of those Mr. Rose submitted?

Mr. McClennen: That one Mr. Rose submitted.

Mr. Wright: No objection.

(Thereupon Defendants' Exhibit D-123 for identification was received in evidence.)

Q. Defendants' Exhibit 123 in evidence is signed by Mr. Wallance, dated February 28th, 1935, approved March 4, 1935, with Columbia Pictures Corporation for, if we can judge by the numbers in the margin, 47 pictures.

The Court: How many?

Mr. McClennen: 47.

The Court: Is that supposed to be for what period of time?

Mr. McClennen: That is of the 1934-35 season.

[fol. 3072] The Court: When was it signed?

Mr. McClennen: Signed February 28th, 1935.

The Court: The 1934-35 season would be half over, then? The season would be half over.

Mr. McClennen: The season would be, yes, nearly half over. Well, actually, half over, that is, the 1934-35 season ran from September 1, 1934, to August 31, 1935.

Q. Do you remember how many of these something like 47 pictures, Columbia pictures of the season of 1934-35 you played?

A. I have this tabulated in my records as 1935-36, because my tabulation starts as of January 1st, and I didn't play all the pictures on this contract. This was a contract that arose after a hearing before the N.R.A.

Mr. McClennen: I ask to have that stricken out, if your Honor please.

The Court: Yes.

Q. My question was how many of the pictures on that contract you played?

A. I think out of this contract we played in the neighborhood of 35 pictures.

(Thereupon Columbia contract, referred to was marked as Defendants' D-124 for identification.)

[fol. 3073] Q. I show you D-124 for identification. Is that signed by you?

A. Yes, sir.

Mr. McClennen: I offer it.

Mr. Wright: We have no objection. Why not put all of the Columbia contracts in if you want to?

Mr. McClennen: I have grown old in the idea that I like to put in my evidence in the way I want to, and not in the way my adversary wants.

The Court: I know, but we might as well put in some of these things to save time. We should have regard for the time on the same subject.

Mr. McClennen: If your Honor please, I have no means of knowing what my adversary wants me to put in. I am putting these in just as rapidly as I can, and these are the only ones as of this date.

The Court: I am speaking of the time spent on the examination.

(Thereupon Defendants' Exhibit D-124 for identification was received in evidence.)

Q. Exhibit D-124 in evidence is dated February 28th, 1935, approved March 4, 1935, for Columbia Pictures of the 1935-36 season and covering, am I right, the entire 1935-36 [fol. 3074] season's product?

Mr. Wright: I assume it speaks for itself. He has already testified on examination that he had first run on Columbia for several seasons including 1934-35 and 1935-36.

Mr. McClennen: If it is conceded this covers the whole season, I need not disturb you with answering the question.

Q. How many were there of the 1935-36, were there of the Columbia season's product, how many?

A. There were about 40, I don't know just how many that balance includes, but, according to my records, it was just 40 pictures.

The Court: That was——

The Witness: That was the year following this.

Mr. McClennen: The product of the season following.

The Court: That was 1935, including March 4, 1935 where the other contract was made in January, 1935 and had 47 on it. It seems to be an overlapping there.

The Witness: That is right, one contract was forced away back to the end of the season and then we picked the other contract up for this other season.

The Court: The first exhibit here shows a contract made [fol. 3075] in 1935. This contract is approved March 4. One is for 47 pictures and the other for a larger number, within three months of one another.

Mr. Wright: One is the 1934-35 season and the other is the 1935-36.

Mr. McClennen: If your Honor please, not infrequently——

The Court: The season started in September.

Mr. McClennen: The pictures were those released from September 1, 1934 and between the two contracts the pictures released from September 1, 1934 to August 31, 1936——

The Court: There was no release in September, 1934, the first release was in January, 1935, according to the contract.

Mr. McClennen: If your Honor please, would you permit me to refer to testimony that has appeared at other times. The distributors release for a season, release, let us say, for a season, a group of pictures for the period from January 1, 1934—from September 1, 1934, if you please, to August 31, 1935, and in this case 40 or 50 or whatever may be the number of pictures, so released. The release season has no [fol. 3076] relation whatever to the time when the particular distributor get the pictures of that season. He gets them in the aggregate. He may get them at any time in the release season, but they are the group of pictures of that——

The Court: I understand all that, but apparently on this record you have a release of 47 pictures in January, 1935 and another release, you say, for the season commencing the following September for 1935-36, some eighty odd pictures in the year past.

Mr. McClennen: No, put in this way in which I have stated it, it has evidently misled your Honor. This Exhibit D-124, dated February 28th, 1935—I mean Exhibit 123, dated February 28th, 1935, is for some 47 pictures, the release of which by this distributor began on September 1, 1934.

The Court: Where does it show that?

Mr. McClennen: It shows that it is the schedule for the 1934-1935 season. That is printed on the contract.

The Court: A contract made in February, not made until January or February?

Mr. McClennen: Yes, your Honor, frequently the contract [fol. 3077] is made long after the beginning of the release season to cover the releases of that season.

The Court: I supposed they would date it ahead, not back. I supposed the contract would be dated some time in September for the following year. You are probably right about that, only it is not established.

Mr. McClennen: Well, it is the fact that the release season, as that is used, has reference to the time when that distributor releases those pictures for that season, not sending them to the particular contractor who may have made his contract before or after.

The Court: Where is the contract of 1934-35?

Mr. McClennen: This one, Exhibit 123.

The Court: They were releasing pictures of that year long before the contract was signed.

Mr. McClennen: Yes, and that is a very common thing with many exhibitors.

The Court: I didn't so understand. I understand that the release date may be a good ways from the contract ordinarily, but the contract, according to them precedes any release.

Mr. McClennen: I will urge your Honor that the evidence will show that frequently the contracts do not come,—some [fol. 3078] are made, some are negotiated until well along in the release season and after the beginning of the season.

The Court: That might answer the problem.

By Mr. McClennen:

Q. By these two contracts, Exhibits 123 and 124, you covered some 90 pictures of the release seasons 1934-35 and 1935-36, did you not?

Mr. Wright: If the Court please, the contracts speak for themselves as to how many pictures they cover. It is stated there.

The Court: I think that is all clear, if your statement of procedure is correct; that appears in the contract, does it not, the number released anyway, although you said some were released and not played or shown.

Mr. McClennen: I had supposed the answer would be right away "Yes," because there is no question about this.

The Witness: There is a question. I don't want to always disagree with you, but I know a lot of these pictures where it says "Photo Play to be designated" were never made. Some of these pictures listed under this contract were played by Schine.

[fol. 3079] By the Court:

Q. You had the right to those?

A. No, some of those pictures, there was a dispute at the N.R.A.,—pardon me for bringing that up again, but there was a dispute at the N.R.A.

Q. Tell how many were released.

A. I know in this year we had them all and in this year, they didn't make the full quota of their pictures, and out of this I doubt if there was over 35 pictures made that one year.

By Mr. McClennen:

Q. That one year being 1934-35?

A. From March 4th, 1935.

Q. No, no. For the release season.

A. No, for 1934; this was the release season 1934-35 and this was the release season 1935-36.

Q. Referring to Exhibits 123 and 124, respectively.

A. Yes, sir.

[fol. 3080] Mr. McClennen: I ask to have these marked for identification, three contracts.

(Three contracts dated June 17, 1937, signed by witness Wallace with Columbia Pictures Corporation for seasons 1937-1938, 1938-1939, 1939-1940, marked Defendants' Exhibits D-125, D-126 and D-127 for identification.)

By Mr. McClennen:

Q. I show you Defendants' Exhibits for identification Nos. D-125, D-126 and D-127 all bearing date June 17, 1937. Are they signed by you?

A. That is my signature; that is mine; those are all three signed by me, that is right.

Mr. McClennen: I offer those in evidence.

Mr. Wright: No objection.

(Three contracts dated June 17, 1937, signed by witness Wallace with Columbia Pictures Corporation for seasons 1937-1938, 1938-1939, 1939-1940, previously marked as Defendants' Exhibits D-125, D-126 and D-127 for identification, were received in evidence.)

Mr. McClennen: Exhibits D-125, D-126 and D-127 are dated June 17, 1937, approved by Columbia Pictures Corporation June 24, 1937. D-125 covers the product of the release season 1937-1938. D-126 covers the product of the [fol. 3081] release season 1938-1939. D-127 covers the product for the season 1939-1940.

The Court: How about 1936-1937?

Mr. McClennen: They are not in this group. If you will get those?

By Mr. McClennen:

Q. When did you negotiate that franchise?

Mr. McClennen: I will offer in evidence the one about which your Honor inquired, namely, the contract of the Auburn Capitol Theatre Corporation by Mr. Wallace, dated

April 15, 1936, approved April 21, 1936, for the product of the Columbia release season 1936-1937.

Mr. Wright: No objection.

(Contract between Capitol Theatre Corporation and Columbia dated April 15, 1936, for 1936-1937 season received in evidence and marked Defendants' Exhibit D-128.)

By Mr. McClennen:

Q. I show you papers not yet marked——

A. Pardon me. What was the question you were asking me?

Mr. McClennen: I have not asked any yet.

(Question read.)

By Mr. McClennen:

Q. I beg your pardon. The question was when you negotiated that franchise, Exhibits D-125, D-126 and D-127?

[fol. 3082] A. Sometime prior to June 24th, or around the spring of 1937.

The Court: That covered the four years?

The Witness: No, sir; that covered three years. That was a three-year franchise.

Mr. McClennen: The other contract, your Honor, spoke of was on a separate date.

The Court: Oh, all right. You had the Columbia from 1934 through to 1940 or 1941?

The Witness: I had the Columbia product continuously from February, 1935, right up to the present time.

By Mr. McClennen:

Q. To abbreviate it, the contract for the 1940-1941 and 1941-1942 franchise was made on December 17, 1940, approved December 23, 1940. Will you look at the papers and see if that is correct?

A. Well, sir, these two contracts were made on the date you specified. One was for the season 1940-1941 and the other is for season 1942, but during that intervening time there was a reformation of the contract, and that is this page here.

Mr. McClennen: I will ask to have these papers marked as one exhibit, one being for 1940-1941 season, the other for

[fol. 3083] the 1941-1942 season, and two others being what has been described by the witness as "reformation" and is recited as an amendment to the contracts, both amendments being dated the second of July, 1941.

Mr. Wright: No objection. I just want to see them.

(Contract for 1940-1941 and 1941-1942 with reformation between Capitol Theatre Corporation and Columbia received in evidence and marked Defendants' Exhibit No. D-129.)

By Mr. McClennen:

Q. Referring to these exhibits of February 28, 1935, and April 15, 1936, was the salesman Murray Briskin of Columbia there named the salesman for the Auburn District at that time?

A. Well, I could not say whether he was or was not, but he called on me. It may have been the Rochester District or the Buffalo District, but he called on me. At the time most of my business, although, was done with Mr. Miller.

Q. In December, 1940, was Mr. Marcus Columbia salesman for the Auburn District?

A. Yes, sir.

Q. In 1936 who was the RKO salesman for the Auburn District?

[fol. 3084] A. I think it was Charles Boasberg. It may have been Jimmie Sper. My recollection is that it was Mr. Boasberg.

Q. Do you remember from then on any salesmen for the Auburn District from RKO except those you have mentioned?

A. No, I don't.

Q. Can you produce any letter to RKO asking for second run?

A. I don't know. I can look for it.

Q. Do you know of having any copy of any such?

A. Well, I could not definitely state. There is a mass of almost ten thousand letters down there. They were all eliminated.

Q. What I asked you is whether you have any recollection of a copy of any letter to RKO asking second run?

A. I believe if——

Q. Memory is what I have asked you, present memory. Have you any present memory?

A. No, no, no present memory.

Q. Is the same true of the other distributors?

A. No, sir. My memory is very clear that I asked Fox for second run. I wrote them.

Q. You have a memory of seeing any copy of such a letter?

A. Yes, sir.

Q. When you began the operation of the Capital in Auburn, which I think you said was in 1931—

A. 1931, yes, sir.

[fol. 3085] Q. The other theatres, that is, the Jefferson, Palace and Strand were being operated by Fox-Metropolitan-Skouras?

A. By Fox as I knew it.

Q. By what?

A. Fox.

Q. Fox-Metropolitan was it known as?

A. No, I don't think so. I always had the impression that it was the Central New York Theatre Operating Company.

Q. Wasn't that Central New York Theatre Operating Company Fox-Metropolitan?

A. Fox-Metropolitan would not be the Central New York Theatre Operating Company.

Q. You mean that the name of the operating company was the Central Theatre Operating Company?

A. Central New York Theatre Operating Company, but I just knew them as the name of Fox.

Q. Well then, when you began, the Central Theatre Operating company with Skouras, the human being, was operating those theatres, that is, the Jefferson, the Palace and the Strand?

A. I can't be certain as to that.

Q. Those theatres had a product of Paramount, Fox, Metro, RKO, Warner and Universal?

A. In 1931? You mean when I started in 1931?

Q. Yes.

[fol. 3086] A. They had what product?

Q. Paramount, Fox, Metro, RKO Warner and Universal.

A. I don't believe they were running Warner in the town at the time. They may have been, but I don't think at the time I came to town they had Warner product. In fact, as I recollect, there was an interval of possibly five or six

months when there were no Warner pictures shown in the town.

Q. In 1932 those theatres had Paramount, Fox, Metro, RKO-Warner and Universal?

A. May I go back to the other question again, please?

Q. While we are at this one, won't you tell me the answer to this?

A. Yes, sir, what pictures did they have?

Q. I am asking you if the company run by Mr. Skouras there had in 1932 the Paramount, Fox, Metro, RKO, Warner and Universal product?

A. No, we had RKO. May I ask you to——

Q. In 1932 you had RKO?

A. Yes, sir.

Q. Have you got any contract indicative of that?

A. I think there is a contract here.

Q. Have you any contract earlier in date than 1.

Mr. Wright: I think, Mr. McClennen, you have the RKO [fol. 3087] contract that was offered in evidence on the direct examination.

Mr. McClennen: But there wasn't any RKO contract with the witness earlier in date than 1933, as I recall it, and I am asking him if there was an earlier one.

Mr. Wright: Yes, but I think in order to understand what you are talking about, we might have that contract here, the one that was offered in evidence, which as I understand it was given to you.

Mr. McClennen: No, it was not given to me.

The Court: Let the witness state first whether you recall any contract prior to 1933 for RKO.

The Witness: I had a contract with RKO-Pathe, 1931 and 1932. I had a contract with RKO after the dissolution of RKO-Pathe arrangement, with the RKO, 1932-1933 season's product. In 1931-1932 I had the full line and in 1932-1933 I had, your Honor—I should say roughly most of the line, but not all of it, but I had most of the top pictures and a split on the cheaper pictures.

Q. I call your attention to Exhibit 813 and ask you if that is the first substantial contract that you had for RKO product at the Capitol?

[fol. 3088] A. I had the contract for the year previous for the full line, including shorts and all.

Q. And then did Mr. Skouras have the contract in the first instance for the 1932-1933 product?

A. I don't understand what you mean by "in the first instance." I had the contract for the 1932-1933 product with the exception of this split, and some of the pictures here, but part of this split I played. All of these pictures I played and I got most of these pictures (referring to document).

Q. You are referring to these words in Exhibit 815 which say "The following fifteen productions were sold to Skouras theatres for first run." That is what I am referring to.

A. Yes, sir.

Q. He had those fifteen pictures sold to him before you made your contract of November 5, 1932, did he not?

A. No, I think as far as I can remember, it was a simultaneous or concurrent arrangement, because we arranged this split, and I think there was some question—pardon me—there was some question of how we were going to arrange the split, and somebody there, I think possibly it was Harry Dixon—it may have been somebody from the Fox office—suggested 1, 3, 5 and 2, 4, 6 arrangement, and whoever split them up was to take the pick, but we were to get a fairly [fol. 3089] equal share. I mean, as a proportionate share, a fair share of a split both ways.

Q. Is there anything in your recollection that is not in accord with this, that Skouras was to have fifteen pictures and you were to have half of the remainder?

A. I was to have all of these. You see, I was sold all of these.

Q. By "all of these" you are pointing to the——

A. These various pictures, and I was sold half after these fifteen. Am I making myself—I mean, I was sold all these, and I was sold half of the remainder on that year's releases after Skouras had the fifteen. These were mine. These were Skouras' and we were both to split half after these fifteen.

Q. Let me read you this language and see if there is anything to the contrary in your recollection of what actually happened. It reads "The following fifteen productions were sold to Skouras theatre for first run." That is followed by fifteen titles by name?

A. Yes, sir.

Q. Then it continues: "The Auburn Capitol Theatre Corporation also agrees to use one-half of the remaining 1932-1933 features released by the distributor at an average rental of $167.30 each, excluding Tom Keene Western." Wasn't that the final arrangement that was made?

[fol. 3090] A. That is the final arrangement. First I got these and got half of what was left, after Skouras got these.

The Court: That reads he has first run of the first fifteen pictures?

The Witness: We both had a first run.

The Court: Not by that language.

The Witness: We had a split of the product.

The Court: We have to look at the contract and see what it says.

The Witness: That is why I contend those contracts were made concurrently.

The Court: The language read seems to indicate just the contrary, that the other company was to have the first run of fifteen named pictures.

The Witness: And we had the first run of those on the other side of the page.

The Court: The following fifteen productions were sold to Skouras as first run. That is plain, isn't it, and the names of those pictures?

Mr. Wright: The first run pictures that are named here in the left-hand column——

The Court: It says "following"—I am speaking of these fifteen. That is all I am speaking of.

[fol. 3091] Mr. Wright: That is right, fifteen were sold first run to Skouras; these that are listed were sold first run to him. The balance were to be split.

The Court: I am speaking of the fifteen, that is all.

Mr. Wright: If the Court please, a split deal does not mean that the others are played ahead. It means these pictures RKO played first run. They are the fifteen.

The Court: Exactly.

Mr. Wright: If there were fifteen other—there were thirteen named pictures that he played first run.

The Court: I am not thinking about those.

Mr. Wright: That is an approximate equal split. Then beyond those pictures there were more than twenty-eight pictures released, and those other releases, those were split

equally between him and Skouras, so it was a split first run deal.

The Court: I am thinking about the first that was read.

By Mr. McClennen:

Q. Do you remember how many RKO pictures there were of that release season in the aggregate?

[fol. 3092] A. I think there were somewhere around 40 or 42, perhaps.

Q. Something like 42?

A. 40 or 42. I did not get as many pictures at $167.50 as I expected.

Q. Of the 42 or thereabouts or 43, Skouras got 15 plus half the balance of 14 and you got 14. That is the fact, is it not?

A. Oh, no, no.

Q. How many pictures of the 42—that season how many pictures of the 42 or so pictures did you get?

The Court: First run?

Q. Of first run, that you actually got?

A. Can I see the contract, please? I got roughly between 28—between 25 and 28 pictures. There is 14 in that column.

Q. The 14 in that column that you have pointed at on the left are the 14 referred to by number as the half of the balance that you were to get?

A. I beg to differ with you, sir. Look, the distinction is here and it is very plain. The price here is $167.50 for this group and the price here is $503.50. Here is the price of these 14, and I was to get half of the remainder at $167.50. I don't want to argue about this thing.

The Court: Don't argue with him. Just answer the question and we will save time.

The Witness: I am just trying to make myself clear.

[fol. 3093] Q. And the contract approved November 5th, 1932, Exhibit 813, is the last contract that you had with R. K. O. for a large first-run lot of pictures for the Capitol Theatre, Auburn?

A. This contract of November 1932, which was——

The Court: Was that the last contract for a large number?

The Witness: Is the last contract that I had for a regular run of pictures. I had a contract for a large number of pictures——

The Court: Just answer the question and we will get along better. State whether this was a last large contract you had with R.K.O. for pictures?

The Witness: Yes, sir.

Mr. Wright: He so stated on his direct-examination.

Mr. McClennen: There are a number of things he stated on his direct-examination I desire to test without being interrupted by comments from Mr. Wright.

The Court: Let us proceed.

Q. Now, those pictures covered by that contract, Exhibit 813, were what season, 1932-33, were they not?

A. Yes, sir.

Q. And you did not play all of those pictures, did you?

[fol. 3094] A. I think we did.

Q. You did not play them in the season, did you?

A. Well, we may have played a few; do you mean by "in the season" or after, if they happened to be released in the summer I certainly did not play them, I postponed them until the fall again.

Q. Now, on October 11th, 1933, were there 14 of the pictures which you had bought under the contract of November, 1932, approved that date, which had not been played?

A. There may have been.

Q. Now, for the next season, the Jefferson and Palace had the R. K. O. product, did they not?

A. Yes, sir.

Q. When I was asking you about the product which Skouris had in the earlier period, you spoke of, R. K. O. and this contract that has just been referred to, Skouris did have Paramount, Fox, Metro and Universal, did he not?

A. Yes, sir.

Q. Now, when this negotiation was going on, November, 1932, had not Skouris already played 15 pictures of the 1932-33 R. K. O. release season under a prior contract?

A. I didn't quite understand that, I didn't get the grasp of that. I will ask you to read that again.

The Court: You don't know whether he had or hadn't,

[fol. 3095] whether he had played 15 of these pictures.

The Witness: Skouris.

The Court: Under a prior contract?

The Witness: He might have, but in 1931-32 we had the R. K. O.-Pathe contract.

Q. This is the 1932-33 season this contract relates to, isn't it?

A. This was the following year.

Q. And the 15 referred to were all 1932-33?

A. Do you mean these pictures, I played this "Hold in Jail", that particular picture, that was supposed to go to Skouris and he never picked it up.

Q. I am not speaking of the playing; you knew when this Exhibit 813 was made by you that Skouris had theretofore been sold 15 of that season's product, whether they had been played or not?

A. Yes, that was the purpose of putting that on the contract. I knew that.

Q. Now, except this R. K. O. transaction which you have described, the only other full-line product that you had had at the Capitol, Auburn, up to the beginning of 1933 was Columbia and United Artists, was it not?

A. Up to the beginning of 1933?

Q. Yes.

A. I had R. K. O.-Pathe; then I had R.K.O. in 1932, [fol. 3096] Columbia 1932,—that is 1932-33. Then in——

Q. Now, if you would observe the question, I said with the exception of the R.K.O. transactions which have just been described, the only full-line product that you had up to the beginning of 1933 was Columbia and the United Artists, wasn't it?

A. Columbia and United Artists and R. K. O.,—Columbia, United Artists and R. K. O.-Pathe.

Q. At the time when you made your first United Artists contract one of the employees of the United Artists had a financial interest in the Capitol Theatre at Auburn?

A. That is correct, yes.

Q. And one of the employees of Columbia had a financial interest in that theatre?

A. Yes, sir.

Q. And by 1933 they no longer had a financial interest in that theatre, is that correct?

A. That is correct.

Q. You were aware, were you not, in the fall of 1933, that Paramount had not been able to negotiate a contract for the 1933-34 product with the Shea-Schine operation?

A. That is correct.

Q. And that because they could not make such a sale, the Paramount product for that season 1933-34, was not in the way of being exhibited in Auburn unless it was sold [fol. 3097] to the Capitol, that is true, is it not?

A. Will you repeat that, please? What do you mean by "Was not in the way"?

Q. I mean there was no other outlet except the Capitol in Auburn that year for it?

A. That is correct.

Q. And it appears by Exhibit 814 that your contract for the Paramount product of that season for the Capitol in Auburn is dated February 8th, 1934, and that is a very late date for Paramount to be placing its season's product first-run, is it not?

A. Well, if I answer that question I will disagree with something you just said a moment ago. You said it is the custom, when it was brought up about Columbia contracts in March——

Q. Now, I don't want to disagree with you.

The Court: Just answer the question.

The Witness: I will tell you frankly I think it is a late date, and there is no implication whatsoever in that.

Q. And you were aware of the fact at that time that the lateness of date was due to the fact of the effort of Paramount to sell to Schine-Shea that season?

A. I don't know what effort Paramount made to sell Schine-Shea.

[fol. 3098] The Court: The question is were you aware of any effort that was made?

The Witness: No, I was not aware of any effort that Paramount made to sell Schine-Shea.

Q. Were you aware of the fact that Paramount did not sell its 1933-34 product to any of the Shea theatres?

A. To any of the Shea theatres?

Q. Yes.

A. You mean the Schine-Shea theatres?

Q. I mean the Shea theatres, whether Schine-Shea or Shea alone.

The Court: Did they sell that year to Shea?

The Witness: To Shea?

The Court: Shea-Schine or Shea alone?

The Witness: I don't know, I am not competent to answer that question, your Honor.

The Court: Then you cannot answer it.

By Mr. McClennen:

Q. Now, you recognized, did you not, from away back as early as 1932, that the Jefferson and the Palace were the normal outlet for the Paramount product in Auburn?

Mr. Wright: If the Court please, that is pure argument. It has already been testified as to where the pictures played.

The Court: I don't think that is a proper question.

[fol. 3099] By Mr. McClennen:

Q. Is this letter of July 4th, 1932 to Paramount-Publix Corporation signed by you?

A. That is signed by me, yes, sir.

Mr. McClennen: I offer that.

(Document shown to and inspected by Mr. Wright.)

(Thereupon letter dated July 4th, 1932, Wallace to Paramount-Publix Corporation, referred to, was received in evidence and marked as Defendants' Exhibit D-130.)

Q. This D-130 in evidence is dated July 4th, 1932, addressed to Paramount-Publix Corporation, attention Mr. Kenneth Robinson. "Dear Mr. Robinson", and it is signed "Very truly yours, H. P. Wallace, Capitol Theatre", and reads in the body:

"We are interested in ascertaining whether or not you have unplayed first-run pictures available for our use at this theatre to include features and short subjects. In looking over the Paramount proposition for this year it appears to me that the program contains all the ear-marks of the best money making proposition of any of the producers. On the fact of what I know of the coming year's picture I could safely say we could offer you between eighteen and twenty thousand dollars for the product, pro-[fol. 3100] viding you cannot get an equitable deal from our opposition. I appreciate the fact that they have first call on the product due to using your pictures this past year current. Best wishes". And the opposition to which you referred there was the Skouris operation?

A. The Fox.

Q. Fox operated by Skouris?

A. Yes, sir.

Q. Did you ever see a letter of March 23rd, 1935 from United Artists Corporation to Willis Sargent, of which I show you what purports to be a carbon copy?

A. This is the first time I ever saw that.

Q. And you never saw any reply to it from Mr. Sargent?

A. No.

Q. Was Mr. Sargent engaged at this time in any way for you?

A. He was my counsel. I don't know about that time, because I just can't place the time he went to California.

Q. Did you inform Mr. Zurich in the early part of 1935 that you had an ample supply of pictures to last you for a year?

A. No.

Q. Did you tell him anything of that kind?

A. No.

Q. Have you any recollection of the number of pictures [fol. 3101] you had under contract, including United Artists, Columbia and Republic and Monogram?

A. Republic and Monogram?

Q. Including Republic and Monogram, was my question?

The Court: Yes, what year are you speaking of?

Mr. McClennen: In the early part of 1935.

The Witness: Why, I think I had thirty United Artists pictures, all that were released, I think I purchased all of them. I had some rejected pictures from R. K. O. I had 44 Columbia pictures and I had roughly 100 pictures, that is, independents and Westerns from the various little independent exchanges.

Q. And in the early part of 1935, after February 28th, 1935, you had these contracts, which have already gone in evidence for this large number of Columbia pictures?

A. I just mentioned that I had 44 Columbia pictures, I think.

Q. And 44 Columbia pictures had reference to the 1934-35 season, did it not?

A. That is correct.

Q. And you already had a contract for something like an equal number of Columbia pictures for the 1935-36 season?

The Court: You have gone all over this.

The Witness: No, I am referring to the first Columbia [fol. 3102] contract we had, that is the contract we had at first.

The Court: By the contract it already appears what he had.

Mr. McClennen: If your Honor please, on the same day, February 28th, 1935, that he got these 40 odd pictures of the 1934-35 season, he got something like the same number by a contract of the same day, of the 1935-36 season. I am asking him that.

The Court: That already appears. What you said was the first contract dates back to 1934, the 1934-35 and 1935-36, —it covers the two seasons.

Mr. McClennen: Yes. I am speaking of the contract dated February 28th, 1935.

The Court: The contracts cover two seasons.

Q. Now, the 40 or so pictures of the 1934-35 season were not played by you until after February 28th, 1935, were they?

A. What contract are you referring to?

Q. I refer to the contract for the 1934-35 season; you had not up to February 28th, 1935, played any of those 40 odd pictures set out in Defendants' Exhibit 123?

A. Up to what date?

[fol. 3103] Q. Up to February 28th, 1935.

The Court: You are spending a lot of time, it seems to me. According to the statement you made sometime ago, while the contract was made February 28th, you suggested part of the contract was made long before it was signed so the pictures would be available.

Mr. McClennen: No, if your Honor please, I did not intend that. What I said was that on February 28th, 1935, he contracted for something like 40 odd pictures of the season of releases from September 1, 1934 to August 31, 1935. I am now saying that of that 40 odd pictures, he had not actually played any until February 28th, 1935.

The Court: Nothing was released.

Mr. McClennen: They were released to the world.

The Court: I was thinking what the position would be for four or five months without playing any pictures.

Mr. McClennen: Because he hadn't bought any of that release season.

The Court: He hadn't paid for them according to the contract.

Mr. McClennen: And he didn't contract for them until [fol. 3104] February 28th, 1935.

Mr. Wright: If the Court please, if the dates on which the pictures were played is going to be material, we have already identified a schedule which shows exactly when each one of these Columbia pictures were played at Auburn and where.

Mr. McClennen: Where is the schedule?

Mr. Wright: That was identified.

The Court: I will let him state if any of those pictures were played prior to February 28th, 1935.

Mr. McClennen: That is my question.

The Witness: Any of these?

The Court: Any of those in that list.

The Witness: No, we didn't play any of these prior to February 28th, 1935.

Mr. McClennen: 1935.

The Court: All right.

Q. Now, with the figures that you have just given, if you include the pictures, some 40 odd, not yet played, under Exhibit 123, of February 28th, 1935, and a similar number under Exhibit 124, for the 1935-36 season, on February 28th, 1935, you had been in the aggregate under contract ahead how many pictures in addition to those that you [fol. 3105] have mentioned from other companies?

Mr. Wright: Don't the contracts show on their face?

The Court: It seems to me it would be 80, wouldn't it, 75 or 80, unless there was some that were left out, I don't know.

The Witness: And some might not have been made.

The Court: According to the face of these contracts there were about 75 pictures you were entitled to on the contract price?

The Witness: Yes.

Q. That covered about a year and a half?

A. Yes, sir.

Q. And apart from the Columbia pictures would you state again the total of the pictures you had?

A. For 1935?

Q. Yes.

A. I had, as I say, for that—including that first contract of Columbia——.

Q. I say without Columbia, all the other ones, just the total?

A. I had roughly 99 independent and Western pictures, that is, you know, from different little independent companies, and I had some pictures from R.K.O., and I think there was 30 from United Artists. It may not be 30, it may be a few less, and it may be a few more.

[fol. 3106] Q. And at that time you were running double feature how many changes a week?

A. Well, I ran usually two changes a week double features. Sometimes I ran three changes a week. Sometimes we used the Westerns up on a Saturday morning show for the children.

Q. Now, do you remember discussing with Mr. Zurich in March of 1935, your situation in this respect, that is, your figures indicated that in the aggregate there were well upwards of 200 pictures under contract ahead of you; now, did you have any talk with Mr. Zurich about that?

A. No, I never had any talk with Mr. Zurich about that.

Q. When did you introduce Bingo at the Capitol Theatre?

A. Some time after the Palace Theatre started.

Q. About when in matter of date?

A. Oh, about some time in 1938.

Q. In 1935, did you install give-away of dishes and so forth at the Capitol?

A. Yes, it may have been 1935; it may have been 1936, but I did have give-away dishes.

Q. Did you make cuts of your admission prices?

A. I don't think so. It may have been the summer policy once in a while, I would not swear to that positively, but as a rule, we always tried to uphold the admission price. [fol. 3107] Oftentimes we gave 5-cent inducement to kids, when we started off with a serial.

Q. Do you recall that the distributors complained that you were cutting admission prices?

A. It may have been.

Q. Don't you remember that they did?

A. I don't remember exactly. It may have been that at some time we may have used a cut rate ticket for a short while, but as a general thing, we never did.

Q. Do you remember in the N.R.A. period those complaints were presented to the Board, the N.R.A. Board, the grievance board?

A. The only complaint that I remember that was presented to the grievance board is, we were trying to get some pictures——

Q. You don't remember of that complaint?

A. There may have been some discussion about a cut rate proposition. I would not say definitely that there wasn't. If you have anything to refresh my memory, I will be certainly——

Q. Didn't you attend a hearing before the Board——

A. I did attend a hearing.

Q. ——on that subject?

The Court: On that subject.

The Witness: Not on that subject, no, sir.

[fol. 3108] Q. You did attend a hearing?

The Witness: In an attempt to get pictures.

The Court: He said in the question "On that subject."

The Witness: Not on that subject, no sir.

The Court: The answer is "No," then?

By Mr. McClennen:

Q. Did you not know of a complaint made to the grievance board in the early part of 1935 about your cut rates at that theatre, and I show you the papers in relation thereto? Don't you know about that?

The Court: Can't you tell us by reference to those papers?

The Witness: I can recollect now, but I know it was taken care of by Mr. Sarachen.

The Court: That is not the question.

The Witness: I can recollect now that there was a complaint, and as I see those tickets—I never appeared at that hearing. I was in the hospital then.

Q. You remember being advised of a decision of the Board that you had cut rates?

A. I don't remember being advised of any decision, because shortly after it I went to the hospital with coronary thrombosis, and for a year after I did not do too much about working in the theatre, but I recognize these tickets, and I [fol. 3109] know they are ours, as soon as I see them.

Q. That is, in December, 1934, you issued tickets which should be good—that is, free tickets which should be good as ten cents toward an admission at the Capitol?

A. May I see them, please? I remember. This——

The Court: That answers it.

The Witness: I remember that.

Q. That meant that in the afternoons at that time, a patron with one of these tickets, an adult patron with one of these tickets and five cents could get into the Capitol Theatre?

The Court: I think it is sufficient. He stated that they did have this kind of ticket. It seems to me that is going far enough.

Q. In June of 1933, under date of June 22nd, 1933, did you write this letter to the United Artists Corporation?

A. I did.

Mr. McClennen: I offer that.

Mr. Wright: I don't understand the purpose of the offer. As far as I can see it has nothing to do with the case; other than that we have no objection to it.

The Court: Do you object to it? I don't know what the letter is.

(Document handed to the Court.)

[fol. 3110] The Court: I do not see as it is very material.

Mr. McClennen: I am seeking, if your Honor please, to accumulate reasons why these distributors should naturally sell to the other theatres rather than the Capitol, because of the character of operation there, and I offer the letter for the purpose of showing that.

Mr. Wright: If the Court please, there has not been the slightest suggestion in the way of testimony that any distributor refused to, or declined to sell the pictures, because of any admission price policy, or anything else.

The Court: Objection sustained at this time.

Mr. McClennen: I would like to have it marked for identification, and the objection saved as to its exclusion.

(Thereupon letter from Mr. Wallace to United Artists Corporation, dated June 22nd, 1933, referred to, was marked as Defendants' Exhibit D-131 for identification.)

Mr. McClennen: I cannot quite restrain myself from commenting on the happy suggestion that no distributor has testified on this subject, when no distributor has testified at all.
[fol. 3111] Mr. Wright: I said there was no evidence to the effect that a distributor had refused product for that reason.
The Court: We have been a long time with this witness. We don't want to waste any further time with discussion after I passed on it. Proceed to something else.
Mr. Wright: If that were a reason——
The Court: Never mind, never mind.
Mr. Wright: —there would have been no picture sold to Schine anywhere.
The Court: Just a minute. We can't spend time on this.

By Mr. McClennen:

Q. Did you show R.K.O. "Snowwhite" first-run at the Capitol?
A. No, sir.
Q. Did you have "Snowwhite Festival" at the Capitol?
A. First-run?
Q. Yes.
A. No, sir.
Q. Where did "Snowwhite" show first-run in Auburn?
A. Jefferson Theatre.
Q. Where did "Snowwhite Festival" show?
A. I couldn't tell, unless I looked at records.
Q. You have no recollection of having shown Snowwhite Festival at the Capitol Theatre in Auburn?
[fol. 3112] A. At all? I showed "Snowwhite Festival", but I showed it, I think, several years, I believe after the other theatres had finished with it.
Q. When did you show it?
A. I couldn't tell you that without looking at records. I could give you the exact date and show you the booking book.
Q. Did you show it in the season 1939-1940?
A. I couldn't answer that. I would be glad to get you the booking book and let you inspect it, and that is the date I will stand on.
Q. On or about January 27th, 1939, did you receive a letter from 20th Century-Fox dated January 27th, 1939, of which I show you what purports to be a carbon copy?
A. I think I did.

Mr. McClennen: I offer that.

Mr. Wright: If the Court please, I don't see what possible issue that bears on. (Handing document to Court).

Mr. McClennen: My thought in offering it was that it bore on the issue of whether the failure to get that product was not because the prices which had been offered for it were not acceptable to the distributor.

Mr. Wright: I don't recall that he testified to any negotia- [fol. 3113] tions with United Artists Corporation at that time. He testified that he got some United Artists pictures that Schine rejected.

The Witness: Pardon me, Mr. Wright——

The Court: Just a moment. We can't have any discussion by the witness with counsel.

Mr. McClennen: Before pressing the offer I will ask the witness, had you made an offer for Gaumont British pictures?

The Witness: I just wanted to correct him, and say that was not United Artists. That was Fox I was talking about, and that related to an old picture. I have the contract on the picture. I did purchase Gaumont British pictures.

Mr. Wright: There isn't any question, if the Court please, he could buy all the foreign pictures that Schine did not want any time from anybody. This is no dispute about that.

The Court: It is competent as bearing on the pictures he did receive or did not receive. I will accept it in that connection.

Mr. Wright: If there is any more foreign picture correspondence, we will stipulate that the foreign pictures which [fol. 3114] Mr. Schine rejected were always available to him. That is understood.

(Thereupon letter from 20th Century-Fox to Mr. Wallace, dated January 27, 1939, referred to, was received in evidence and marked as Defendants' Exhibit D-132.)

By Mr. McClennen:

Q. The stipulation is accepted as far as it goes. Defendants' Exhibit D-132 is dated January 27th, 1939, from 20th Century-Fox Film Corporation to H. P. Wallace, stating—I think your Honor has read the letter, so that I need

not reread it—stating the reasons why they cannot accept the contract which he proffered on account of the price.

The Court: Is that all?

Mr. McClennen: That is all, if your Honor please.

Mr. Wright: I think I can finish up in 10 or 15 minutes, if your Honor wishes to sit.

The Court: If we don't have any further redirect, we might get through.

Mr. Wright: There is some redirect.

The Court: I mean recross. I think we better suspend until tomorrow morning. Just a moment. You spoke about adjourning tomorrow night?

[fol. 3115] Mr. Wright: Yes, I understand that the Crescent case will be ready in the Supreme Court, either the 18th or the 19th, so I will have to be down there on Wednesday. I wanted to get down there the day before, before the argument.

The Court: I thought you meant to be there that day.

Mr. Wright: No, I would have to be there the day before, and I thought we may as well, as long as there is still an uncertainty whether it would carry over into the 19th—I supposed we would probably adjourn until a week from Monday.

The Court: I thought you meant to adjourn for a single day, Wednesday.

Mr. Wright: No, I would expect to be in Washington Wednesday, and the case would be reached the next day, and perhaps continue to the next day.

The Court: You lose three days, the rest of this week?

Mr. Wright: We will lose three days, yes.

The Court: How long will it take you to put your proof in?

Mr. Wright: I had hoped we would be able to finish up [fol. 3116] the first part by the middle of the following week.

The Court: Next week?

Mr. Wright: Yes, but, of course, it is dependent on the length of time spent on cross-examination. I had assumed we would be finished with Mr. Wallace long before this.

The Court: What are your wishes in the matter?

Mr. McClennen: My first wish is not to discommode Mr. Wright when he has a case to argue before the Supreme Court of the United States, and the next is that when we

adjourn, in view of the prospect that he will take the 18th and 19th, that we adjourn to the 23rd of October.

The Court: Will you engage in the argument yourself?

Mr. Wright: Part of the argument. Mr. Berge and I.

The Court: I think that will be better. Proceed for a few minutes.

Redirect examination.

By Mr. Wright:

Q. Did you observe whether, during the period Schine operated the other theatres in Auburn, that there were any give-aways or admission price reductions, Bingo, Bank Night, anything of that sort?

[fol. 3117] A. There were.

Q. During what period?

A. From the period of 1937 up to the present time.

Q. I will hand you these folders entitled "Schine's Jefferson" and "Schine's Palace," and ask if you recognize those as having been distributed in the Town of Auburn?

A. They were.

Q. During what period of time?

A. They were distributed weekly during 1937-38 season.

Mr. Wright: I will ask to have them marked the next exhibit number.

Mr. McClennen: Is this an offer or for identification?

Mr. Wright: As soon as it is marked, I will offer it.

(Thereupon two circulars headed "Schine's Jefferson" and "Schine's Palace," referred to, were marked as Plaintiff's Exhibit No. 830 for identification.)

Mr. McClennen: This, I take it, is for identification now?

By Mr. Wright:

Q. Do you recall any cut price tickets being given away for any of the Schine Theatres?

A. I did.

Q. When was that?

A. During this same period.

Q. Do you know what the value of those tickets were that [fol. 3118] were given away?

A. No, I don't.

Q. All you know is they were price reductions?

A. Yes, sir.

Q. After this 1937-38 season when these give-aways and Bingo, and so forth occurred, did you notice whether they played the same pictures of the same companies the next season?

A. They did.

Q. First-run?

A. Yes, sir.

Q. Did any distributor that you have referred to tell you that you could not play their pictures because you had cut prices, or had run Bingo games, or had given away free tickets?

Mr. McClennen: That is objected to. It has appeared here in the excluded letter——

Mr. Wright: Well, I simply——

Mr. McClennen: Now, just don't be so impatient as all that,—the complainant, that they were objecting, that their pictures could not be played at the reduced price, and the letter was excluded on my adversary's objection.

The Court: The reception of this testimony might make the letter receivable.

[fol. 3119] Mr. Wright: It might open it up for you.

Mr. McClennen: That is awfully nice of you to think of that, but if it was not admissible when I offered it, I submit this question is not admissible.

The Court: I will let him answer.

The Witness: What is the question, please?

Mr. Wright: Read the question.

(Question read.)

The Witness: No, sir. Pardon me——

The Court: That answers the question.

Mr. Wright: I will ask to have this telegram marked with the next Plaintiff's Exhibit number for identification.

(Thereupon telegram referred to was marked as Plaintiff's Exhibit 831 for identification.)

The Court: That is the one that was referred to some time ago?

Mr. Wright: This is a copy, as I understand it, that came from the R.K.O. Exchange files. There was some question raised before as to whether R.K.O. really sent the telegram. I am merely offering the copy that came from their files.

[fol. 3120] (Thereupon Plaintiff's Exhibit 831 for identification was received in evidence.)

Mr. Wright: As I understand it, this was shown to Mr. McClennen before, and I take it there is no dispute about the fact that that is a copy of the telegram that came from the R. K. O. Exchange in Buffalo.

The Court: That is the telegram to which reference has been made, and its contents have been discussed before.

Mr. Wright: Mr. Wallace identified the one he received. Objection was made to its going into evidence on the ground there was nothing to show R. K. O. had sent it. In order to cure that objection, I am offering the copy from the files of the R. K. O.

Mr. McClennen: Objection was to its admissibility. I have no objection to this.

The Court: That telegram was referred to several times in your examination.

Mr. McClennen: I have no objection whatever to this exhibit, if your Honor please.

Mr. Wright: Then I offer it in evidence.

The Court: Let me see the telegram.

Mr. Wright: This is a copy that came from the Exchange. [fol. 3121] As I say, when the other was not admitted in evidence—the objection was sustained on the ground that it did not appear that R. K. O. had actually sent the wire.

The Court: How does it now apear that R. K. O. sent the wire?

Mr. Wright: As I understand it, this is the copy that came from the R. K. O. Files In their Buffalo Exchange, and this is an exact duplicate.

Mr. McClennen: I have now been assured that this was found in the files of the R. K. O., and, therefore, I am making no objection to the authenticity of the telegram originally offered, but merely object to such a telegram being receivable.

The Court: Received.

Mr. Wright: I thought that was out in the papers earlier in this examination. Have you got it?

The Court: It has another number?

Mr. Wright: The other one had a number. I don't have it at the moment.

The Court: You can look it up.

Mr. Wright: I think we can use this one just as well. I

would like to read the telegram to your Honor. I don't think [fol. 3122] you heard the contents. This is dated September 18th, and is addressed to the Strand Theatre, Syracuse, New York, and states: "Impossible supply Hurry Charlie September 24-26 or they Meet Again 27-30. Suggest Saint's Vacation, also first-run September 24-26. Will advise later regarding 27-30. Please wire."

The Court: The date of that is what?

Mr. Wright: September 18th.

By Mr. Wright:

Q. Now, you were asked on cross-examination about when you wrote the words "Canceled" on the "Hurry, Charlie, Hurry" contract, and the "They Meet Again" contract, that are part of this Exhibit 819, and as I recall, you testified you were not sure when that was placed on there, except that it was some time during the time you were operating the Strand Theatre, is that right?

A. Yes, sir.

Q. Can you tell us when it was put on there with reference to the receipt of this telegram, Exhibit 831?

A. After I received that telegram.

Mr. Wright: By the way, I believe you were going to check the list of product that played at the Empire. We had offered that tabulation.

[fol. 3123] By Mr. Wright:

Q. The original of the telegram is Exhibit 820. It was originally marked in evidence, then for identification, and I believe it should now be marked in evidence.

(Thereupon original telegram previously marked as Plaintiff's Exhibit 820 for identification was received in evidence.)

By Mr. Wright:

Q. On cross-examination, I believe you were asked with reference to this Exhibit 818, regarding the meaning of the words "Available" and the dates following them that appear on the second page, there, and you testified that those were the dates on which the pictures would become available to the Strand Theatre?

A. Yes.

Q. Do you recall that?

A. Yes, sir.

Q. Are those the dates on which the pictures would become available to the Strand, or were those the dates on which the pictures would become available in Syracuse for first-run exhibition?

A. I could tell you that better if I just looked at this release sheet, but I am pretty sure——

Q. That is the first 1941-1942 block, isn't that right?

A. I think those are the dates they would become avail-
[fol. 3124] able to the Strand Theatre, December 10, 1941.

Q. Perhaps I misunderstood your direct testimony, then. As I understood your direct testimony, it was that this block of five was not to become available to you until after those pictures had played all of the other runs in Syracuse. Is that right or wrong?

A. I think those dates would indicate that.

Q. Please answer the question about your direct testimony. Is that your understanding, that the pictures were not to be available to you until after they had completed their runs in the other Syracuse theatres?

A. Yes, sir.

Mr. McClennen: That is objected to as immaterial, what his understanding was. What he said.

The Court: Sustained. Strike it out.

Q. I call your attention to the first date there available, October 29th, 1941. As I understand it, the group of pictures that are named there are pictures which were to be released during September and October of 1941. That is, they were the current product?

Mr. McClennen: That is objected to.

The Court: The paper would show for itself, would it not?

The Witness: That is right. That is the first block of five pictures——

The Court: Just a moment. Sustained.

[fol. 3125] Q. Do you have the release dates of those pictures?

A. I think so, yes, sir.

Q. What were the release date on "Charlie's Aunt"?

A. August 1st, 1941.

Q. And "Private Nurse"?

A. August 22nd, 1941.

Q. And "Wild Geese Calling"?

A. August 15th, 1941.

Q. "Sun Valley Serenade"?

A. August 29th, 1941.

Q. Then, as I understand it, the dates which are written on there as available are the dates when Rowell said the pictures would have completed their runs in the other Syracuse——

A. Yes, sir.

Q. All the other Syracuse theatres?

A. Yes, except, I suppose, they weren't going to play at the Empire Theatre, because afterward he wrote "Ahead of Empire Theatre".

Q. Did he say whether or not those pictures had been sold to the Empire Theatre?

A. He didn't say.

Q. Did you know whether the Empire was at that time playing any pictures after they had played all of the other runs in Syracuse?

[fol. 3126] A. Well, they had played some old pictures, yes, sir.

Q. Had played some old pictures?

A. Yes, sir.

Q. But did he talk about the 1940 current releases?

A. If I had that list I could tell you whether they played any current releases.

Q. You are now referring to——

A. That list of play-offs at the Empire Theatre.

Mr. Wright: Has anybody located it?

Mr. McClennen: That does not check exactly with the list we made up.

(Document handed by Mr. McClennen to Mr. Wright.)

Mr. Wright: I will ask to have the next exhibit number for identification given to the list which Mr. McClennen has just furnished as stating what their records show as to the features played at the Empire and admission prices.

(Thereupon document above referred to was marked as Plaintiff's Exhibit No. 832 for identification.)

Q. Then is it possible to tell from looking at the features listed, or looking at exhibits 817 and 832 for identification what runs the features listed there were played?

[fol. 3127] A. Well, reasonably possible.

Q. Well, wouldn't you have to compare the matter to know the play dates of the same films in the other Syracuse theatres?

A. That is right.

Q. Now, rather than take the time on the witness-stand, I wonder if it would be agreeable to have him make his check of your list against his, and then advise us whether he thinks it is correct at a later date, so we can come out with the correct fact? I don't want to take the time when he is on the stand.

Mr. McClennen: I have no objection to that being checked to see if there is any error in the list furnished by us.

Mr. Wright: Then I will ask you to do that after you leave the stand, Mr. Wallace, and advise us of the result on the list of your pictures, which I believe was marked for identification as Exhibit No. 816, the name of the distributor or producer appears, but I don't believe you gave that testimony when you supplied the playing dates and names on your direct examination.

Q. Now, can you tell me which of those pictures were major products and give the name of the major distributor of those which you previously named, which were major [fol. 3128] releases?

A. "Jungle Cavalcade" was released in 1932 and was released by R. K. O.; "Flying Down to Rio", R. K. O.; "Bowery Blitzkrieg", Monogram; "Caught in the Act", Producers Releasing Corporation; "Father Steps Out", Monogram; "Gentleman from Dixie", Monogram.

Q. No, I just want the major ones. You can lump all the independent ones, just the major distributors; there are about six or seven there, I believe, if you can tell which they are.

A. Well, "Convoy" is a foreign made picture distributed by R. K. O.; "Tom, Dick and Harry" was R. K. O.; "They Met in Argentina", R. K. O.; "Reluctant Dragon" was R. K. O.—Disney; there was a special contract on that. "Blonde From Singapore" was Columbia. I think that covers them all.

Q. Other than those R.K.O. pictures you have named and the one Columbia picture, all the others were independent?

A. Yes, sir.

Q. As I understood you on cross-examination, you say that you have no contracts for these R.K.O. pictures in your possession other than these that are identified here as Exhibit 819; you mean these other two show all the R. K. O. pictures you played?

A. Yes, sir.

[fol. 3129] Q. I understand the only contracts you have in your possession are those marked Exhibit 819?

A. Yes, sir.

Q. I notice among the group in Exhibit 819, you don't have any for "Jungle Cavalcade" and "Flying Down to Rio"; do you know whether there were contracts for that?

A. Yes, sir.

Q. It is your understanding Mr. Carr has the other contracts?

A. Yes, he has approved contracts and he has the applications. I asked you to have a subpoena for those.

Q. You did not attempt to go through the records of the corporation? All you brought here was what you had yourself?

A. When I left there September 26th, I didn't go back. That is how it happens I didn't know about this judgment.

The Court: Just answer the question.

Q. Am I correct then in my understanding that what you have produced here are what you showed to the Government was all the contracts that you, yourself, had?

A. That is all I had aside from the deal sheet. I had a deal sheet where we entered into the contract.

Q. But the other——

The Court: He says that is all he had.

Q. Now, had you ever—you don't know then, at this time, whether there actually were executed contracts for any [fol. 3130] of these seven R. K. O. pictures, is that right?

A. I don't know that there were any executed——

Q. I said, you don't know whether there were actually approved contracts for any of them, or not, is that right?

A. No, I think we received approved contracts, and Mr. Carr has them.

Q. You think he has the approved contracts?

A. Yes, sir.

Q. Had you ever in the course of your experience booked pictures into theatres without a contract?

A. That is a regular custom with any theatre.

Q. Had you done that with R. K. O. previously?

A. I had.

Q. Where?

A. I had done it a number of times. I have booked at the Novelty; it is a regular custom; at the Novelty; and I booked them at the Roxy, the Harvey Theatre, and I booked them at the Strand Theatre.

Q. When you booked a picture without a contract, what is the procedure with reference to making one up?

A. Well, sometimes as a rule after you book a picture without a contract, you get a deal sheet like I got there, that is the agreement, it is an agreement that is oral, but it is an agreement, nevertheless, and sometime that [fol. 3131] day or some time later the contracts are prepared and signed and sent in to the Company. Sometimes they are spot booked without contracts, but as a rule contracts are made up on something that we agree to on a deal sheet.

Q. And in this case you think there were contracts subsequently made up on all of those seven pictures?

A. I know there were, there were and these are the copies that were left where they were left at the office of the Strand Theatre.

Q. And you, yourself, haven't been able to locate the other two?

The Court: You have gone over the question many times, and he says "Carr has them".

Q. On your cross-examination, I believe you said that during one period where you had stated that the picture "Secrets of a Model" played, there were two other pictures that played instead; do you know are there any other corrections that you think should be made in that testimony?

A. I think there is one picture there; I think there is a confusion in that one where a picture called "Headleys at Home" or something like that; may I look at that?

(List shown to witness.)

The Witness: It wasn't "Secrets of a Model". "Secrets [fol. 3132] of a Model" didn't play there. There were two so-called sex pictures that played there, but we rented the theatre.

Q. Yes. You covered that on your cross-examination. All I am asking you is whether there are any more, whether there are any other changes that should be made so we will have a correct list of the product that played there?

A. There may be one other picture, there was another picture purchased for these people to go with this, because there was some trouble about this so-called sex show. I think they took one picture off and substituted another picture. There may be another picture in there about that time, but aside from that, these are all correct. I can get that information for you because there must be correspondence on it.

Q. Would you take Exhibit 816 for identification then and make a further check of your play off records so you can then notify us if there is any other change which has to be made in the list that you gave us to conform it to your booking record; would you do that?

A. I will.

Mr. Wright: I take it if we submit that list you may not, or if you desire to cross-examine on it, we can recall him for that purpose.

[fol. 3133] Mr. McClennen: I don't see why I should do anything about that list.

The Court: When you get the list you may not want to cross-examine on it, but you will be entitled to have the witness come back.

Mr. Wright: We are as interested as counsel is in having in the record an absolutely correct list of features that played at both the Empire and Strand.

Mr. McClennen: I have brought out what I believe to be a complete and correct list. If the witness finds that to be so, that ends the story. If he does not agree with it, then I should want to find out by cross-examination why he doesn't want to agree with it.

The Witness: I think that was covered in cross-examination. I mentioned about these changes.

The Court: Do not discuss it with counsel.

Recross examination.

By Mr. McClennen:

Q. Mr. Wallace, you said you left September 26th, and did not go back, left where?

A. Left September 26th?

[fol. 3134] The Court: You said something about going to the hospital.

Q. Within the last ten minutes you said "I left there September 26th and did not go back."

A. Where do you refer to?

Q. That is what I was going to ask you, what did you refer to?

A. You mean when I was speaking with Mr. Wright here?

Q. When you were testifying within the last ten minutes.

A. I didn't say "September". I think January 26th is when I left the Strand Theatre and didn't go back.

Q. You said September 26th; you meant January 26th, 1942?

A. I meant January 26th, 1942, and that is why I was not aware of this judgment you spoke about today.

Redirect examination.

By Mr. Wright:

Q. These R.K.O. pictures on Exhibits 117 and 118, I notice the statement after run is "sub", and under "clearance" it just says "as available". Do you recall when, if at all, those pictures became available to the Strand?

A. Well, they were old pictures and I think they were available as soon as we could get an availability list. I imagine they would be available whenever there were prints there. We never played these pictures.

[fol. 3135] Q. The pictures were not played, but you don't remember when the prints were made available, do you?

A. Well "Convoy" was made available to us a year after the release date. I think it was a year after the release date, and these pictures are anywhere from three to eight years after the release date.

Q. At any time you were negotiating with R. K. O. for pictures did any one from R. K. O. decline to service you

with pictures because you had bought pictures which you hadn't paid for? Was that ever given as a reason?

A. No.

Mr. Wright: That is all.

Mr. McClennen: I now offer in view of your examination as to complaints as to cutting rates the Defendants' Exhibit for identification No. 131, the letter of Mr. Wallace to the United Artists Corporation, dated June 22nd, 1933, as to the Capitol Theatre in Auburn.

Mr. Wright: That letter, if the Court please, is just as immaterial as it ever was. All it shows is there was a discussion of a United Artists complaint to him about certain admission prices. There is nothing in that letter to show [fol. 3136] United Artists ever refused to service him with pictures.

The Court: Overruled. Received.

(Thereupon letter dated June 22nd, 1933, Wallace to United Artists Corporation, previously marked for identification as Defendants' Exhibit No. D-131, received in evidence.)

The Witness: Can I see that letter, Mr. Wright?

(Defendants' Exhibit D-131 handed to the witness by Mr. Wright.)

Recross examination.

By Mr. McClennen:

Q. In Defendants' Exhibit 118, you signed the contract for R. K. O. Radio Picture "Convoy". That was a picture that was released and became available in the season of 1940-41, was it not?

A. That is a picture that was made a year previous. It was a foreign picture.

Q. And released a year before this time?

A. Before what time?

Q. October 7th, 1941?

The Court: That is the testimony, you said that was a year-old picture.

The Witness: Yes, the picture was a year old, a year [fols. 3137-3140] after it was made.

Mr. McClennen: That is all.

The Court: We will adjourn until tomorrow morning at 10 o'clock.

(Whereupon a recess was taken until Tuesday, October 17th, 1944, at 10 A. M.)

[fol. 3141] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223

UNITED STATES OF AMERICA

vs.

SCHINE CHAIN THEATRES, INC., et al., Defendants

Continuation of trial before Honorable John Knight, United States District Judge for the Western District of New York, October 17th, 1944, 10 o'clock A. M.

Appearances:

Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Special Assistants to the Attorney General, and Milton Kallis, Esq., Special Attorney, in behalf of the United States.

Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homans, Esq., and Edward M. Antevil, Esq., appearing for the Defendants.

[fol. 3142] PROCEEDINGS

PETER C. VOURNAKIS a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. Vournakis?
A. Watertown, New York.
Q. What is your occupation?
A. Theatre owner.
Q. What theatres do you own there?

A. The Strand and Liberty.

Q. How long have you owned them?

A. The Strand I operated from 1924 to 1926; I bought the property in 1926. The Liberty, I bought the property in April, 1933.

Q. About what is the seating capacity of those theatres?

A. The Strand is about 400 seats and Liberty is about 700.

The Court: Where did you say those were?

Mr. Wright: Watertown.

Q. Calling your attention to the year 1932, what other theatres were then operating in Watertown?

A. The Avon, Olympic and Victoria.

[fol. 3143] Q. Avon is A-v-o-n?

A. Yes, sir.

Q. The Olympic and Victoria?

A. And the Strand.

Q. Who operated the Avon and Olympic?

A. The Skouris Brothers for the Fox theatres.

Q. The Victoria?

A. Graham and Ludlow.

Q. You were then operating the Strand?

A. The Strand.

Q. On what policy?

A. Second-run and first-run.

The Court: What is that?

The Witness: Second-run and first-run.

Q. Then for the 1932-33 season can you tell us what major product you exhibited at the Strand second-run?

A. I had Paramount, Warner and Fox and first-run an Independent product.

Q. Then during the year 1933 who took over the operation of the Avon and Olympic?

A. The Schine Enterprises.

Q. Graham and Ludlow continued to operate the Victoria?

A. The Victoria.

Q. And that was the year in which you bought the Liberty?

A. That is the year I bought the Liberty.

[fol. 3144] Q. Then——

The Court: 1933?

The Witness: In 1933.

Q. Did you play those major companies that you have just mentioned second-run in either of your theatres during the 1933-34 season?

A. No, third-run.

Q. And did any of those companies offer the product to you for second-run for that season?

A. No.

Mr. Wright: Now, I will ask to have these two letters marked as one exhibit, one is the reply to the other, for identification.

By the Court:

Q. Do I understand you, you didn't have any of the first-run after 1933?

A. No, until this year.

(Thereupon two letters, referred to, were marked as Plaintiff's Exhibit 833 for identification.)

Q. In any of your three theatres?

A. I only had two theatres.

Q. You had the Olympic and Victoria, you said?

A. No, I had the Strand and Liberty.

Q. Oh, yes, I understand, in either of the theatres, you [fol. 3145] mean?

A. Not any of the theatres.

The Court: You spoke about having bought the Liberty back in '33.

Mr. Wright: Yes, he had the Strand since 1926.

Mr. Rogers: Pardon me, Mr. Wright. I think your Honor inadvertently said "First-run". His testimony was he had Paramount, Warner and Fox second-run.

The Court: In 1932.

Mr. Rogers: In 1932-33 he had Paramount, Warner and Fox second-run, not first-run.

The Court: I asked if he had first-run after 1932, you see the point I had in mind.

By Mr. Wright:

Q. I show you these two letters clipped together and marked for identification as Exhibit 833, and ask you if you wrote the carbon copy letter and received the original

letter there as a reply to the original, the respective dates that they bear?

A. Yes, sir.

Mr. Wright: I offer this in evidence.

Mr. Rogers: These came from the exhibitor's files?

Mr. Wright: No, these are Mr. Vournakis' documents.

Mr. McClennen: We make the usual objection to these, on [fol. 3146] the general grounds that there is no relation to this case or to Schine. There is no question about the authenticity of the letters.

The Court: Let me see them.

(Documents previously marked as Exhibit 833 were then inspected by the Court.)

The Court: All right. Overruled.

(Thereupon Plaintiff's Exhibit No. 833 for identification was received in evidence.)

Mr. Wright: Mr. Vournakis' letter to Fox is dated June 26, 1934, and states:

"Gentlemen: This letter is to advise you that I am interested in buying the 1934-35 product from your company second-run in Watertown for my theatres. No doubt you are aware of the fact that during the season 1932-33 I only bought second-run in Watertown. Last year I made an attempt to buy second-run, but was unable to secure the same for the reason your company sold the second-runs away. Kindly advise me when I may expect your representative to call on me with reference to negotiating a [fol. 3147] deal on your product second-run in Watertown."

The reply is dated June 27th, 1934, and states:

"Replying to your letter of June 26th, beg to advise that we already disposed of our 1934-35 product second-run in Watertown. We are arranging to have our representative visit you in an endeavor to work out a deal for third and fourth-run showing."

(Thereupon the documents referred were then marked as Plaintiff's Exhibits Nos. 834 to 838, inclusive, for identification.)

By Mr. Wright:

Q. I show you these two letters marked as Plaintiff's Exhibit 834 for identification, one to Warner and their reply, and ask if you received those on or about the dates they bear?

A. Yes, sir.

Mr. McClennen: Same objection to these letters.

The Court: They relate to the situation concerning the purchase of films?

Mr. Wright: Yes.

The Court: Overruled.

[fol. 3148] (Thereupon Plaintiff's Exhibit No. 834 for identification was received in evidence.)

Mr. Wright: Exhibit 834 consists of a letter dated June 25th, from Mr. Vournakis to Warner Brothers at Albany which says:

"This letter is to advise you that I am interested in buying the 1934-35 product from your company second-run at Watertown for my theatres. No doubt you are aware of the fact that during the seasons 1929-33 I only bought second-run at Watertown. Last year I made an attempt to buy second-run but was unable to secure the same for the reason your company sold the second-runs away. Kindly advise me when I may expect your representative to call on me for the purpose of negotiating a deal for second-run at Watertown."

The reply is dated July 16th, 1934, from Mr. R. Mochrie, on the home office stationery:

"Dear Mr. Vournakis: Referring to your several letters addressed to our Albany Branch, please be advised at the [fol. 3149] present time we have a satisfactory account of second-run in Watertown. Should an occasion arise at a later date we will ask Mr. Ray Smith to get in touch with you."

Q. After you got that letter did Mr. Smith get in touch with you about second-run?

A. No.

Q. Or anybody else from Warner?

A. No.

The Court: You said you had the first-run in 1932?

Mr. Wright: He said he had first-run of the independent product.

The Witness: First-run of independent.

The Court: And second-run of others in 1932?

The Witness: Yes, sir.

Mr. McClennen: To exhibits for identification, 835 to 838, respectively, we make the same objection as to the last.

The Court: Do they purport to be communications arranging for the purchasing of films?

Mr. Wright: Yes. I don't believe I have actually asked the witness to identify them, although I have them marked.

By Mr. Wright:

Q. 835 is a letter from you to Paramount and a reply, [fol. 3150] which were written on or about the dates they bear?

A. Yes.

Mr. Wright: That is offered.

The Court: Overruled.

(Thereupon letter from Mr. Vournakis to Paramount and reply, previously marked for identification as Plaintiff's Exhibit No. 835 was received in evidence.)

Mr. Wright: 835 is a letter from Mr. Vournakis to Paramount at Albany, dated June 25th, 1934.

"This letter is to advise that I am interested in buying 1934-1935 product from your Company second-run in Watertown for my theatres. No doubt you are aware of the fact that during the season 1928 to 1933 I only bought second-run in Watertown. Last year I made an attempt to buy second-run, but I was unable to secure same for the reason your company sold the second-runs away. Kindly advise me by return mail when I may expect your representative to call on me with reference to negotiating a deal on your conduct second-run in Watertown."

This reply is from C. G. Eastman, Branch Manager, [fol. 3151] Albany, dated June 27, 1934:

"I have your letter of June 25th, regarding the sale of our product in Watertown on second-run basis for the coming year. Please be advised that we will be in no

position to talk on the matter until we have secured a satisfactory first-run deal.

The Court: Until what?

Mr. Wright: "Until we have secured a satisfactory first-run deal."

By Mr. Wright:

Q. After you got that letter from Mr. Eastman did anybody, he or anybody else from Paramount, come and talk to you about a second-run deal?

A. No.

Q. I show you this letter from Universal and reply, which has been marked as Exhibit 836 for identification, and ask you if you wrote and received those letters respectively on or about the dates they bear?

A. Yes.

Mr. Wright: We offer 8[illegible] in evidence.

The Court: Same ruling.

[fol. 3152] (Thereupon letter from Mr. Vournakis to Universal and reply previously marked as Plaintiff's Exhibit 836 for identification was received in evidence.)

Mr. Wright: This is Mr. Vournakis' letter to the Universal, addressed to Albany, dated June 25th, 1934. It states:

"This letter is to advise you that I am interested in buying 1934-1935 product from your Company second-run in Watertown, for my theatres. Kindly advise me by return mail when I may expect your representative to call on me with reference to negotiating a deal on your product second-run in Watertown."

The reply is dated July 7, 1934. It states:

"We have your letter of June 25th. We regret that we will be unable to offer you our product second-run in Watertown for the reason that it is under franchise to the Olympic Theatre. Kind regards." Signed by "Nate Saubet, Branch Manager."

By Mr. Wright:

Q. You were not using the second-run of Universal at the time you wrote the letter?

[fol. 3153] A. No, that is right.

Q. I will show you this letter from you to Metro-Goldwyn-Mayer and their reply, marked Exhibit 837 for identification, and ask if you wrote and received those letters on or about the dates they bear?

A. Yes, I did.

Mr. Wright: That is offered in evidence.

(Letter from Mr. Vournakis to Metro-Goldwyn-Mayer and their reply, previously marked as Plaintiff's Exhibit 837 for identification, was received in evidence.)

Mr. Wright: The letter of June 25th from Mr. Vournakis to Metro is addressed to Albany. It says:

"This letter is to advise you that I am interested in buying 1934-1935 product from your company second-run in Watertown for my theatres. Kindly advise me by return mail when I can expect your representative to call on me with reference to negotiating a deal on your product second-run in Watertown."

The reply is dated June 27, 1934, signed by Mr. Pielow, Albany Manager.

"Wish to acknowledge receipt of your letter of the 25th [fol. 3154] inst., relative to second-run product in Watertown. Please be advised that we are not in a position at this time to offer our second-run product to Watertown."

By Mr. Wright:

Q. After you got that letter did any representative from Metro offer second-run on that product?

A. No, I was not using Metro second-run, anyway, at that time. The Victoria had the second-run.

Q. I will show you these letters marked Plaintiff's Exhibit 838 for identification, and ask you if you wrote and received those letters respectively on or about the dates they bear?

A. Yes.

Mr. Wright: I will offer those in evidence.

(Thereupon letter from Mr. Vournakis to Columbia and reply thereto, previously marked as Plaintiff's Exhibit 838 for identification was received in evidence.)

Mr. Wright: The letter of June 25th, 1934, from Mr. Vournakis to Columbia is addressed to Albany.

"This letter is to advise you that I am interested in buying the 1934-1935 product from your Company second-run in Watertown for my theatres. Kindly advise my by return [fol. 3155] mail when I can expect your representative to call on me with reference to negotiating a deal on your product second-run in Watertown".

The reply is dated July 14, 1934, signed Branch Manager, by—I guess it is C. N. Johnston.

"Wish yo acknowledge yours of the 25th, stating you are interested in buying our 1934-1935 product second-run in Watertown for your theatres. The definite runs have not as yet been determined in your town inasmuch as we have not negotiated up to this time a deal with the Schine Circuit. Just as soon as we have anything definite I will advise you."

By Mr. Wright:

Q. After you got this letter from Columbia, did you receive any further advice or offers?

A. No, because I was not using Columbia second-run.

Q. You had not been using that at that time?

A. No, Victoria was using Columbia second-run.

Q. Then, during the 1934-1935 season did you have any major product second-run in either of your theatres?

A. I had at the Strand, part second and part third.

[fol. 3156] Q. What were the pictures, the part that you played second?

A. It was the smaller pictures.

Q. That is, those were not played at the Avon or Olympic second-run?

A. Pictures was playing Olympic first-run. I was using second-run at the Strand.

Q. Those that played Olympic second-run?

A. I was using them third-run.

Q. You played third-run?

A. That is right.

The Court: Are there five theatres in Watertown?

The Witness: Six.

The Court: What is the population?

The Witness: 33,000.

The Court: What is that?

The Witness: Thirty-three.

Mr. Wright: I will ask to have this document marked as the next exhibit number for identification.

(Thereupon carbon copy of letter from Mr. Vournakis to Mr. Myer Schine, was marked as Plaintiff's Exhibit 839 for identification.)

By Mr. Wright:

Q. I will hand you this carbon copy of a letter marked [fol. 3157] Exhibit No. 839 for identification, and ask you if that is a copy of a letter you wrote to Mr. Myer Schine on or about that date?

A. That is right.

Q. Can you tell me what the conversation was that you had with Mr. Schine which is referred to in the first paragraph of that letter?

A. Well, I went into the office——

Q. Just a minute. Where was this conversation?

A. In Gloversville, his office. This is dated September 3rd, 1934.

Q. What was the date of the conversation?

A. It was about August 29th.

Q. That was at Gloversville?

A. Yes.

Q. Who else was present?

A. Just Myer and I.

Q. What was said then?

A. He was trying to make a deal, buy my places out of there, or we tried to make some kind — booking arrangement, so he can buy my pictures.

Q. What was said by him or by you about his buying pictures for you?

A. He said if I give him—first, was try to buy me out. He offered me *for* $15,000 for the theatres, and I said "No," [fol. 3158] and then the other talk was if I pay him $25 a week, he would buy my pictures up there, and after five or six months, if he can acquire the Palace, it would give me good rent for the Strand, and I said "No."

The Court: The Palace?

Mr. Wright: The Palace was the theatre that was being operated by Graham and Ludlow, according to the witness' prior testimony.

Mr. Rogers: He has not so testified.

The Court: What was the last statement about the Palace?

(Last portion of last answer read.)

A. (Continuing:) Then after that, after I left, he told me "When you go back, think it over, and think whatever you decide to do and write me a letter," and this is the letter I write him.

Q. After you wrote the letter, did you hear anything in reply to it?

A. No, no more.

Q. Calling your attention to the 1935-1936 season, is this contract—I hand you copy of the contract you made with Fox that year?

A. That is right.

Mr. Wright: I will ask to have that marked the next exhibit number for identification.

[fol. 3159] (Thereupon contract between Vournakis and Fox for 1935-1936 season, was marked as Plaintiff's Exhibit 840 for identification.)

Q. I will show you this contract dated June 22nd, 1936, between you and Fox and ask you if that is your copy of the contract you made with Fox for the—the first contract you made with Fox for the 1936-1937 season?

A. Yes, and this one is the second.

Q. And I show you this contract dated November 2nd, 1936, and ask you if that is your copy of the superseding contract made with Fox for the same season?

A. This same season, yes, this is the fourth-run deal, and that is the third and fourth.

The Court: 1936-1937, you mean?

The Witness: Yes, sir.

Mr. Wright: I will ask to have these two 1936-1937 season contracts marked the next two exhibit numbers for identification.

The Court: Separately numbered?

Mr. Wright: Separately.

(Thereupon two 1936-1937 season contracts for Watertown were marked as Plaintiff's Exhibits 841 and 842, respectively for identification.)

Mr. Wright: I offer in evidence these three contracts [fol. 3160] marked 840 to 842, inclusive.

(Two letters were then marked as Plaintiff's Exhibits 843 and 844 for identification.)

Mr. Wright: These are offered.
Mr. McClennen: That is the three contracts?
Mr. Wright: Yes, sir.

(Thereupon contracts previously marked as Plaintiff's Exhibits 840, 841 and 842 for identification were received in evidence.)

By Mr. Wright:

Q. I hand you a carbon copy of a letter marked Exhibit 843 for identification, and ask you if that is a copy of a letter you wrote to Mr. Grassgreen of Fox on or about the date it bears there?
A. Yes, sir.
Q. October 31, 1936?
A. Yes, sir.
Q. And this paper marked Exhibit 844 for identification dated November 2nd, 1936, is that a copy of——
A. Yes, that is a copy of——
Q. (Continuing:) —a communication from you to 20th-Century-Fox, the same day?
A. Yes, sir.
[fol. 3161] Q. Now, this contract that has been marked as Exhibit 841, can you look at that and tell me the date on which you signed that application?
A. This one is the 22nd day of June, 1936.
Q. And that contract calls for third-run.
A. Third-run, that is right.
Q. After you made that contract with Fox, did Mr. Grassgreen, or any one else from Fox come to see you about it?
A. The salesman came up and see me.
Q. Who was the salesman?
A. I can't remember now, Goldsmith, the salesman must be on the other contract. I can't remember the name of the salesman.
Q. What did you do after the salesman came?
A. He told me to go down and see Moe on account of Schine Enterprises bought the Palace.

Mr. McClennen: May that be excluded? What he did was all that was asked.

The Court: Strike it out.

Q. After the salesman came did you go to see Mr. Grassgreen at Albany?

A. Yes, sir.

Q. Was there anybody else present?

A. Just Moe Grassgreen.

Q. What did he tell you about that contract?

[fol. 3162] A. We have to change contracts from third-run to fourth-run on account of he bought the third-run for the Palace.

Mr. Rogers: We can't understand you.

Q. Just tell us what Mr. Grassgreen said about the contract.

A. He told me to release him from the third-run contract on the Strand on account they want to sell it to the Palace Theatre, Watertown, on account Schine bought the Palace, and they had all other products bought third-run for that house. They wanted me to release them from the contract, and they give me a better deal for the Strand fourth-run.

Q. Is that when you gave them this letter that is Exhibit No. 843?

A. Yes, sir.

The Court: Did the superseding contract follow that?

Q. Was it about the same time you gave him this Exhibit 844?

A. Yes, sir.

Q. That refers to the Liberty?

A. Going fifth-run.

Mr. Rogers: You mean 844 for identification?

Mr. Wright: Yes.

Q. You had bought third-run for the Strand and fourth-run for the Liberty?

A. Yes, sir.

[fol. 3163] Q. And you released both runs?

A. I released both runs and made the Strand fourth-run and Liberty fifth-run.

Q. This contract, Exhibit 842, is the one you made for the Strand fourth-run?

A. Yes, sir.

Q. And that was made on what date?

A. The second day of November, 1936.

Q. Then during that 1936-1937 season, Schine was operating what theatres?

A. Was the Avon, the Olympic and Palace.

Q. And you still had the Strand and Liberty?

A. Strand and Liberty.

Q. And Victoria——

A. Was Graham and Ludlow.

Mr. Rogers: What was that year, you said, Mr. Wright?

Mr. Wright: The 1936-1937 season.

Q. The Fox product that played that year then played the first three runs in the Schine theatres?

A. That is right, first, second and third.

Q. And was that also true with respect to the other major pictures you had for that year?

A. Paramount and Warner.

Q. Then during the year 1937 did you have any further conversation with Mr. Schine about your theatres there?

[fol. 3164] A. No, I don't believe it was in 1937, but I think it was around 1938.

Q. In 1938?

A. Yes, sir.

Q. What was the conversation and where was the conversation you had in 1938?

A. Well, it was in my office.

Q. At Watertown?

A. Yes, sir.

Q. Who else was present?

A. Mr. Bill Tupper. He is District Manager.

Q. Which Mr. Schine?

A. Myer.

Q. Mr. Myer Schine?

A. Yes, sir.

Q. What was said then?

A. We sat there and was talking house business. We said we — trying hard to make a living up here. He asked me if I was interested to sell out. I said I never thought of it, and we sat there for a little while, and after they went he told me that in case——

The Court: Who told you?

The Witness: Myer, he told me in case——

Q. What do you mean by "after they went out," who went?

A. I mean Bill Tupper and Mr. Myer Schine, after they [fol. 3165] went from the office.

Q. After they left the office?

A. They left there.

The Court: Then what happened?

The Witness: They told me in case——

Q. Was this another meeting?

A. No, the same meeting.

Q. Did you leave the office with them?

A. Yes, I left there in my office there.

Q. Go ahead.

Mr. McClennen: This is Mr. Myer Schine he is going to say said this?

The Court: You talked with Myer Schine?

The Witness: Yes. He told me in case I want to do anything to tell Bill Tupper and Bill Tupper would take the proposition over with Myer. About three or four weeks later I decided to go home to Greece.

Mr. McClennen: This isn't a conversation now. May it be excluded?

The Court: Strike it out. What was done about the sale?

The Witness: It was about three or four weeks I decided to say I was planning to go to Greece, and that is the time Bill Tupper told me if I want to sell out that Myer called [fol. 3166] him up and they offer me $35,000 for the Liberty. I said to Bill Tupper I would sell out both houses for $85,000 if they want to buy them out, they can let me know right away before I leave, and I haven't heard anything more except the offer for the Liberty.

Q. Then calling your attention to the——

The Court: Did you have the title to both places? Did you own the land?

The Witness: Yes, both, and buildings.

Q. Calling your attention to the 1937-38 season, did you then go back to third-run?

A. I went back to the third-run at the Strand and fourth-run at the Liberty.

Q. And the Schine houses played the first two runs?

A. First two runs, yes.

Q. On the major product you played at the Strand and Liberty?

A. Yes, sir.

Q. Did that continue the same way through 1938-39?

A. Yes, that continued right along after that.

Q. Do you recall approximately what admission prices were being charged in the town there when Mr. Schine took over the operation of the Avon and Olympic in 1933?

A. Before, the best I can remember, the Olympic was charging 25 and 35 and the Avon was 35 and 40. I can't tell [fol. 3167] exactly, because it is so far back.

Q. What were you charging?

A. 25 cents and Victoria was 25.

Q. Then in that year 1933, do you recall any changes that were made?

A. Well, the Olympic went to 25 all over the house and I went to 20 cents at the Strand, and the Liberty was still 20 cents.

Q. How about the Avon, any change there?

A. The Avon, I think was 35 and 40, I can't remember.

Q. Then you say the Olympic went to 25 cents all over the house; was it a house with a balcony?

A. Yes, sir.

Q. About how many seats in the balcony?

A. I believe it was between six and seven hundred.

Q. Were there any further changes in 1933?

A. No, not until the year 1935.

Q. 1935, what happened in 1935?

A. That is when the admissions went down in the houses in Watertown. The Olympic was charging, I think, balcony 15 cents.

Q. At night?

A. At night, and I went down to 15 and 20 at the Strand, and at the Liberty 15 cents.

Q. What do you mean by "15 and 20"?

[fol. 3168] A. 15 upstairs and 20 down.

Q. You had a balcony, too?

A. Yes, sir.

Q. How many seats in your balcony?

A. 132, and at the same time I was giving tickets myself, two for 20 cents, that is, one ticket and 20 cents admits two adults.

Q. That went on through 1935, the prices you mentioned?
A. Yes, sir.
Q. Was there any change in 1936?
A. No, not until late in 1936.
Q. What happened late in 1936?
A. The Olympic came back to 25 cents.
Q. That is after the Palace was taken over?
A. Yes, sir.
Q. What prices were charged there?
A. 15 and 20.
Q. Did they have a balcony, too?
A. Yes, sir.
Q. How many seats?
A. I don't know how many seats.
Q. Approximately?
A. I think around 700, I can't tell because I never checked.
Q. Then the Palace charged the 15 cents in the balcony and what on the main floor?
[fol. 3169] A. 20 cents.
Q. You were charging?
A. 15 and 20 at the Strand.
Q. 15 is your balcony and 20 main floor at the Strand?
A. Yes, sir.
Q. And the Liberty was what?
A. 15 cents.
Q. The Liberty all this time was playing behind the Strand?
A. Behind, yes, sir.
Q. Then how long did those prices continue?
A. Well, that continued for, I think, around 1937-1938, I think.
Q. Then what happened?
A. I can't remember, and then a little later we got together because we had too many houses, to close up two houses up there and just open them Saturday, Sunday and Monday.
Q. I am talking about admission prices.
A. Admission prices, they stayed about the same right along there until the tax come on, and when the Pine Camp came on, we all went up.
Q. That was in 1940?
A. 1940, yes, sir.

The Court: When what came up?
The Witness: Pine Camp.

Q. That was the Army camp?
[fol. 3170] A. The Army camp.
Q. During the time from 1933 on there, did the Schine Theatres have any give-aways of any kind?
A. Yes, they gave money away and they gave cars away, and I gave dishes away, and I gave money away.
Q. Did they give any tickets away?
A. I think they gave the first year for a month, I believe, at the Avon.
Q. In 1933, that was?
A. Yes, 1933, but didn't give any more.
Q. Didn't give tickets after that?
A. No.
Q. The only give-aways after that were money give-aways and automobiles?
A. Money and automobiles.

Mr. Wright: I will ask to have these marked the next two numbers for identification.

(Thereupon the documents referred to were marked as Plaintiff's Exhibits Nos. 845 and 846, respectively, for identification.)

Q. I show you this Plaintiff's Exhibit No. 845 for identification, and ask you if you recognize the signature on there and know who signed it?
A. That is right.
[fol. 3171] Q. Who?
A. Mr. George Lynch.
Q. And that was given to you on what date?
A. September 20th, 1939.
Q. And this Plaintiff's Exhibit 846 bears your signature?
A. That is right.
Q. It was signed on the same day?
A. The same day.
Q. You had a conversation with Mr. Lynch on September 20th, 1939, did you?
A. Yes, sir.
Q. Whereabouts?
A. I was in his office.
Q. How did that conversation come about?

A. Well, it was about three or four days ahead of Myer called me up over the telephone.

The Court: Who called you up?

The Witness: Mr. Myer Schine. He told me if I went down to Gloversville they had something for me, that it would be a benefit up there, so we can straighten up the Watertown situation. I have told him, I remember, I wasn't feeling good, but I will go down and see him, so I did.

Q. Who did you see when you got to Gloversville?

[fol. 3172] A. When I went there they was pretty busy and I went and sat with George and was talking about film rentals, and was talking about protection. I asked him the protection was a little too high in Watertown, 60 days after the second-run.

Q. What did you say?

A. I asked him if they would reduce it a little. He said "I think we are going to do something up there, Pete, for you," and that is the paper he gave me.

Q. This Exhibit 845 for identification?

A. Yes, that is right.

Q. Did he dictate that then?

A. No, he had it already made out, I think.

Q. He gave it to you?

A. Yes.

Q. Did you see Mr. Schine?

A. Yes, I see him a little later.

Q. How much later?

A. About an hour later or so.

Q. What was the talk you had with Mr. Schine?

A. We started talking about the Watertown situation up there, and I told him it would be better if we closed up two houses up there. He said "Maybe have to do something like that, because they got too many houses." Afterwards, he told me to do something for him, if I want to do it or not.

[fol. 3173] I said "What is it?" He said "Sit down and dictate something." I said "No, I can't dictate anything." He dictated that letter and ask me if I want to sign it, all right, and if I don't want to sign it, all right.

Q. This letter he dictated that you are referring to is this Exhibit 846?

A. Yes.

Q. Then it was written up by his girl?

A. Yes, he dictate it, yes.

Q. You signed it?

A. Yes, I signed it.

Q. After these documents 845 and 846 were signed on the 20th, did you get major pictures earlier after their runs——

A. Yes, a little. They got the protection down to 30 days.

Q. Which companies?

A. I believe it was Warner's, Paramount—Metro was always—and United Artists, but Fox never reduce it to 60 days—never reduce it below 60 days.

Q. You say Paramount, Warner's and United Artists reduced to 30. How about R. K. O.?

A. R. K. O. was 30, too.

Q. Did you have any negotiations or conversations about these reductions with representatives of the film companies?

[fol. 3174] A. I ask the salesmen to give me 30 days protection instead 60.

Q. I mean, after these documents were signed on the 20th?

A. After I got the reduction, after.

Q. But I say, after that date did you have any conversation or talk about those reductions with the representatives of the film companies?

A. No, I never had.

Mr. Wright: We offer Plaintiff's Exhibits 845 and 846 in evidence.

(Thereupon Plaintiff's Exhibits 845 and 846, previously marked for identification, were received in evidence.)

Mr. Wright: Exhibit 845 is dated September 20, 1939. It states:

"Mr. Peter Vournakis of the Strand and Liberty Theatre, Watertown, has requested and I have agreed to reduce the clearance of 60 days, second-run over third-run, to 30 days on the following companies: Paramount, Fox, Warner's, R. K. O. and United Artists." Signed "George W. Lynch."

By Mr. Wright:

Q. It also has a place for your signature?

A. Yes.

[fol. 3175] Q. Did you sign a copy and give it to him?

A. I can't remember.

Mr. Wright: Exhibit 846 bears the caption of this case, and is headed "Affidavit." It states:

"Peter Vournakis, being duly sworn, deposes and says: I am a citizen of the United States and reside in the City of Watertown, New York. I have been in the theatre business in the City of Watertown for the past 20 years. A great portion of that time I have been operating and still operate two theatres in opposition to the Schine Theatres in that city, and during the entire period I have never experienced any unpleasantness, and at no time have I had any difficulty in obtaining the pictures I wanted to buy. I have always found that their theatres were conducted in a business-like manner on a fair competitive basis. Subscribed and sworn to before me this 20th day of September, 1939."

I will ask to have these contracts marked with the next seven plaintiff's exhibit numbers for identification.

[fol. 3176] (Thereupon seven contracts between Mr. Vournakis and film companies, were marked as Plaintiff's Exhibits 847 to 853, inclusive, for identification.)

The Court: These are contracts that have been identified?

Mr. Wright: No, these have not been previously identified. These are contracts Mr. Vournakis produced, and that is why I want to identify them now.

The Court: Any objection to those?

Mr. McClennen: No, your Honor.

The Court: All right, received.

Mr. Wright: I have not asked him to identify them. Of course, if there is no objection, I will offer them.

(Thereupon Plaintiff's Exhibits Nos. 847 to 853, inclusive, previously marked for identification were received in evidence.)

Mr. Wright: You may cross-examine.

Mr. Rogers: I don't think there is any cross-examination, may it please the Court.

The Court: I want to ask a question or two.

By the Court:

Q. You spoke of a time when an offer of $15,000 was made to you?

A. Yes, that is when I had just the Strand at that time.

[fol. 3177] Q. That is the first one?

A. That is the first one.

Q. You had just the Strand at that time?

A. Yes, the Liberty I had given it back, because I was sick at that time. I turned the Liberty back, and just operated on a profit saving basis.

Q. $15,000 related solely to the Strand?

A. Just the Strand, yes.

Q. That took place where?

A. That was in Gloversville.

Q. How did it hapen that you went there?

A. That is the time, I believe, he called me up, or I went there, I can't remember. I have been paying him a visit quite often, because we was trying to get together so we can straighten out the Watertown situation.

Q. You don't recall whether you were asked to go down, or whether you went of your own accord?

A. I can't remember, your Honor. I can't tell.

Q. The second time you said you had a talk with Mr. Schine and Mr. Lynch at Watertown?

A. It was not Mr.——

Q. Later you went down to Gloversville?

A. It was not Mr. Lynch. It was Mr. Tupper.

Q. Oh, yes, you said Mr. Lynch called you up. How did you happen to go to Gloversville the second time? You [fol. 3178] spoke about your going back to Greece?

A. That is Mr. Bill Tupper called me up, District Manager, and if I would be interested to sell out before I go.

Q. Was that at——

A. Watertown.

Q. Watertown?

A. Yes. Mr. Myer Schine call up Mr. Tupper and ask him if I would be——

The Court: You don't know about that, only what Tupper told you?

The Witness: That is all.

Q. You went to Gloversville after that and saw Mr. Lynch and Mr. Schine?

A. That was later. Yes, it was later.

Q. About two weeks later you said?

A. No, that was longer than that.

Q. Had you come back?

A. Yes, it must be a year later, I believe.

Q. How did it happen that you went to Gloversville at that time?

A. That is when Mr.——

Q. When they made this offer of $35,000?

A. That was in Watertown.

Q. That was in Watertown?

A. That is right.

[fol. 3179] Q. How did you happen to contact Mr. Schine at that time, when he made that offer?

A. I didn't—through his District Manager.

Q. Did you call the District Manager?

A. No, the District Manager called me up. He came down to see me. It was, I believe, just a few weeks apart. That is when Mr. Myer Schine came up there and tried to make a deal with me.

Q. That is the time when he offered you $35,000 and you told him you wanted $80,000?

A. $85,000 for both places or nothing.

Q. You then had?

A. The Strand and the Liberty, both properties.

Q. You made this affidavit down there at Gloversville?

A. Yes.

Q. Was that true?

A. Well, as far as the thing is there, that the affidavit says, I always be able to buy pictures, I always be able to buy pictures after him, but not before him. That means, I have to wait after they get through, and then buy them.

Q. There are other things in the affidavit.

A. Sure.

Q. There are other things in the affidavit, also?

A. As far as the competitive business, we always com-

[fol. 3180] peted there.

Q. You said something about the company being fair?

A. Well, we compete. We compete up there.

Mr. Wright: If the Court please, I don't think it is material how the witness or any witness here might characterize any competition that occurred. I suppose it is for the Court to judge ultimately.

The Court: It is important to know how the witness expressed himself, what he said. It has a bearing, of course, upon the proof of the facts.

Mr. Wright: But I would suppose his conclusions in any event as to such ultimate questions as to whether or not a particular practice was fair, would be immaterial.

The Court: To some extent that might be true. At the same time, it has a bearing otherwise. All right.

Mr. Rogers: May I straighten one matter out.

Cross-examination.

By Mr. Rogers:

Q. With reference to the Strand, when that offer was made——

A. Yes.

[fol. 3181] Q. That offer was $15,000 above the mortgages that were on the property?

A. That is one thing I can't tell you, and I can't remember, because the only thing I would dispute was the $15,000. I want to be honest. I can't remember if it was above the mortgage or including the mortgage.

Q. Do you remember what that mortgage was?

A. The mortgage was $10,000, yes.

The Court: You owned the building and equipment?

The Witness: Yes. That is something I can't remember.

The Court: That is all.

Mr. Wright: I have another witness who was supposed to be here, but he is not here. If we could have a short recess, I think we have some documents to offer.

The Court: All right. Let me know when you are ready.

(Short recess.)

[fol. 3182] Irving Cohen a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. Cohen?

A. I now live at 32 Oakdale Drive, Rochester, New York.

Q. What is your occupation?

A. Well, I have a theatre in Corning, New York.

Q. How long have you had the theatre at Corning?

A. Since about 1926, or thereabouts.

Q. You own the theatre, yourself, now?

A. Yes, sir, I do.

Q. For how long?

A. Well, since July 1st of 1943, I have it by myself. Previously to that I had a partner.

Q. You were in partnership with whom?

A. Mr. Morris Gaby.

The Court: From 1925?

The Witness: From 1926 to 1943.

Q. That is the Plaza Theatre there?

A. The Plaza Theatre.

Q. How large a theatre is that?

[fol. 3183] A. Oh, about 450 seats.

Q. Calling your attention to the year 1932, what other theatres were operated there?

A. In 1932 they had the State and the Fox, the Fox Theatre, and I think it is 1932, I believe, he just had the State; I don't think the Fox was built.

The Court: The State?

The Witness: The State; I believe the Schine State was in active operation.

Q. Who was operating it then?

A. The Schine Enterprises.

Q. In 1932?

A. Yes, that wasn't 1932, that was before the Schines made a deal with Fox.

Q. If it appeared Schine made a deal with Fox in 1930, would you still say Schine was operating the State during 1932?

A. No, it was then the Fox, they ran the State and Fox. Then the Fox Theatre was up at that time, yes.

Q. In 1932?

The Court: You don't mean there were four theatres in Corning?

The Witness: There was three; there was the old Liberty Theatre, which was rebuilt and called the Fox; Schine never ran that, until it was built by Fox, and he took it [fol. 3184] over from Fox and ran it. He also had the State.

The Court: That made the third theatre?

The Witness: The Fox made the third theatre.

Q. As I understand, in 1932, prior to the time Schine took over the State and Fox, those two theatres were being operated by the Fox interests?

A. By the Fox interests.

Q. And you were operating the Plaza?

A. Yes, sir.

Q. Were those the only three theatres operating at that time?

A. Yes, just about that time the Palace was built; also, when the Schine leased or sold to Fox, there was an old Regent Theatre there which was sold to a man by the name of Gerber, and he built the Palace on the site of the old Regent, just also about that time.

Q. And opened it about 1932?

A. Yes, sir.

Q. Then there were——

A. That made four theatres.

Mr. McClennen: Could I interrupt you a minute? May we understand when these witnesses speak of Fox, they are speaking of that Fox Metropolitan Organization?

[fol. 3185] Mr. Wright: I assume so.

The Court: Yes.

Q. Now, at that time can you tell us approximately what policy each of the theatres was operating on?

A. Well, when the Fox Theatre—shall I start when we first went in in 1926?

Q. No, start with 1932.

Mr. Rogers: All you are interested in is 1932, isn't it, Mr. Wright?

Q. 1932.

A. 1932, when the Fox Theatre was operating, they had made a deal with Gerber and for a time the Palace Theatre was closed, and we were able to get some picture first-run in Corning, and others second-run.

Q. Are you talking about major product?

A. Well, we had one major company which was Warner.

Q. First-run?

A. Yes, sir.

Q. That was the only major company you had first-run?

A. Yes, sir, at that time.

Q. Then you had major second-run?

A. Yes, sir, we had some major second-runs, that is all we had, was first-run and second-run. We had some independent first-run, too, at that time.

Q. Then calling your attention to the 1933-34 season,

[fol. 3186] after Schine took over the operation of the—what were those two theatres?

A. Well, the deal—the Palace situation changed again, and to this Gerber about the time Schine went back into Corning, the Palace reverted back to Gerber, and Mr. Gerber had some first—he ran his theatre with some first-run pictures. He had one company called "Columbia" and another "United Artists," so we were able to buy those pictures second-run.

Q. This was 1933-34?

A. At the time the theatres reverted back to Schine, after the Fox——

The Court: You mean the State and Fox?

The Witness: Yes, and all major product at that time, why, the best we could get was third-run.

Q. That is as to the major product which Schine was playing?

A. Yes, he played first-run at the Fox. Then he took the better pictures and played them again at the State and then they were made available to us.

Q. That is, what he didn't play second-run at the State, you would get second-run at your house?

A. Yes, sir.

Q. What he would play second-run you got third-run?

A. Third-run.

The Court: Did that apply to all majors?

[fol. 3187] The Witness: Yes, the only pictures of the majors we were able to buy at that time, you could not consider Columbia or United Artists a major company,—we were able to get Columbia and United Artists because the only prior run they had in Corning was the Palace.

Q. You were able to get them after the Palace?

A. Yes, we followed Schine and the major product came to us third-run.

The Court: At the Palace——

The Witness: The Palace tried to run with what product they could get on the basis of first-run. They had Columbia and had United Artists and what independent product they could pick up. They did later also buy some second-run, but very little, they couldn't get it.

Q. Now, then, did the same general policies continue into the 1934-1935 season, or were there any changes in the product situation then?

A. The next change was when the Palace—when the Schine Enterprises made a deal with the Palace and took that over. Then the best we could get was third-run in all major products.

Q. When was it, if you recall, that Schine took over the Palace?

[fol. 3188] A. I don't exactly recall the year. It was about that time, around 1935 or 1936. It was just about that time. You see, Mr. Gaby was running the Plaza at that time. I was at Hornell, but while I was in general touch with the situation, these years sort of slipped by, and it was about that time that that——

Mr. McClennen: Just a moment. As the witness is evidently speaking second-hand, we ask that that be stricken out, about the date.

The Court: If he knows approximately the date.

The Witness: Yes.

Mr. McClennen: It is so far off it simply encumbers the record.

Mr. Wright: We will read into the record the date that appears in the interrogatories, the answer to interrogatory 17-A. It states with reference to the Town of Corning under the "Palace Theatre, formerly Regent."

"Nature of interest—lessee."

"Extent of interest—100 per cent."

"Date acquired—April, 1938."

"Other interests, if any in excess thereof—none."

"Seating capacity—398."

"Owned or leased—leased."

[fol. 3189] "If leased, name of lessor—Fred Gerber, Corning, New York."

By Mr. Wright:

Q. As I understand it, there wasn't any important change in the product situation in so far as your theatre, the Plaza, was concerned after 1933-1934, until Schine acquired the Palace?

A. The Palace.

Q. Then what happened?

A. Well, it sort of worsened for us to the degree, whereas before we were able to acquire second-run, whatever the Palace played, from then on, the best we could get was third-run, excepting Columbia. Columbia did sell us second-run. That was the only company that sold us second-run.

Q. On some product did you have fourth-run?

A. Unless you could classify reissues. Sometimes we would run a reissue, but third-run was our general—you see; they would make the picture "As available." If Fox came to sell us a contract, they would sell us pictures as available after Schine. Schine had the privilege of running at the Fox, at the State, and then it was made available for us—or at the Palace.

Q. Fox, State or Palace?

A. Yes, but we didn't run more than third-run, except if it [fol. 3190] was a reissue.

Q. What was the situation with respect to admission prices in the year 1932 or before Schine took over—took back the operation of the State and the Fox?

A. Our general price—well—was, while the Fox theatres—that is, when Schine made his deal with Fox, our admission price was 35 cents.

Mr. Rogers: That is not the question, may it please the Court, and we move to strike the answer. It was before Schine took over.

The Court: 1932.

Mr. Wright: That is right.

Mr. Rogers: May that be stricken?

The Court: Strike it out.

The Witness: That was before Schine took over from Fox?

The Court: What was your policy then?

The Witness: Before Schine took over from Fox, our policy was—yes, 35 cents. We were charging 35 cents at that time, because we had first-run on Warner's.

The Court: 35 and what in matinees?

The Witness: No, that was our evening price, and we had matinees Saturdays and Sundays.

Q. What were the State and Fox charging?

A. Well, the Fox price was, I think, 40 cents at that time.

[fol. 3191] Q. And the State?

A. The State was, I think—well, I don't think the Fox—

at one particular time there, I don't think they ran the State. It was the Fox and the Plaza.

Q. Then after, in the 1933-1934 what were the prices charged by various theatres?

A. We went down—the best we could get at that time was either third-run or some seconds, and we went down to 25 cents, and the State price was 25, and I believe the Fox price was 35. The Palace price was 35, too, at that time, 25 or 35.

Q. Those were all evening adult admission prices you are talking about?

A. Yes, I am talking about evening prices. I believe they were a little less during matinees, except Saturdays and Sundays.

Q. About how long did those prices continue?

A. Well, we had pretty tough sledding on those third-run pictures.

Mr. McClennen: May that be stricken out?

The Court: Yes, strike it out.

The Witness: Well, we just couldn't make—I don't know how to answer that. We could not make a go of it.

Mr. Wright: Read the question.

[fol. 3192] (Question read.)

The Court: Just answer the question.

The Witness: Was that after——

The Court: After 1933-1934.

Q. The prices you have just described?

A. I would say for six months. I mean, not very long. After Schine took back, and the best we could get was third-run pictures.

Q. As I understand it, you just described the prices that prevailed after Schine took the theatres back in the 1933-1934 season. Then I asked you how long those prices continued, if you know?

A. I don't remember. You can tell by the contracts, of course. I don't remember offhand.

Q. You don't remember——

A. I mean, I can't honestly answer that question unless—you see—of course, we went—we immediately went down to 25 cents, and the best we could get was third-run, and the State, they slashed their price, and we had to run after the State, so we went down to 20 cents. At one period the State went down to 15, and we had to go down to 15.

Q. In general——

A. I mean, that took a process of time, around 1934 to 1938 or 1939. It was about that time Mr. Gaby and I took a [fol. 3193] trip to Gloversville to see Mr. Schine——

Q. Let's just confine ourselves to the price situation first here. During this period was there any time when your prices at the Plaza were lower than the prices at which Schine was playing major product ahead of you at the State?

A. They weren't lower than the State. I don't believe they were lower than the State. When we dropped to 15 cents, it was really to meet the price that existed at the State.

Q. In general the prices at the State, then, were the same as yours?

A. As our price. We had to come down to meet their price.

Q. Do you recall whether there were any give-aways?

Mr. McClennen: Just a moment. I ask to have that answer stricken out, "We had to come down to meet their price," not responsive.

The Court: Let him state the facts. "Had to come down" is a conclusion.

Q. State whether or not you did come down.

The Court. Did you come down to the price of the State?

The Witness: Yes. I think at one time we were charging more than the State. We had to.

The Court: Strike out the words "Had to."

Q. Do you recall whether at any time after 1933 there were [fol. 3194] any tickets given away for the Schine theatres there?

A. Yes, I recall that very much. They started a student ticket. Any student would be admitted into the theatre with 15 cents.

Q. What theatre was that?

A. That was to all Schine theatres that were running in town.

Q. Including the first-run theatre?

A. Fox,—yes, admitted in the Fox or the State.

Q. In those the regular first-run price was what?

A. I think at the Fox the price was 35 cents, and they possibly had a lower balcony price. I think it was a quarter in the balcony at that time.

Q. Did you ever have any conversations with Mr. Schine about the situation there in Corning? Just answer "Yes" or "No."

A. Yes, we did.

Q. When was the first time?

A. This was after Schine took over the Palace. We thought perhaps we could work something out, and Mr. Gaby and myself, we took a trip to Gloversville and asked——

Q. When was this, as nearly as you can place it?

A. 1939, I believe.

Q. Some time in 1939?

A. 1939. It was in July of 1939.

[fol. 3195] Q. Who was present? Who did you see at Gloversville?

A. We saw Mr. Myer Schine.

Q. Any one else?

A. Not that I recall. I think his brother—I think we saw him there. I don't remember any conversation with him.

Q. What was said then?

A. We asked, now that the situation at Mr. Gerber's Palace, was simply that Schine and we had—we were in town, and if we couldn't work something out, that we could get some product, so that we could live, if we couldn't get some second-run pictures, and then we could go to a quarter, and I recall Mr. Schine—we said at that time to him "You have so many theatres. We have this one," and there was something—you know, he could do for us there. Mr. Schine, I remember answering that every situation had to take care of itself, and they didn't have enough product themselves.

The Court: That is what he said, you say?

The witness: That was one of his answers to us, to the question, when we requested that the company give us some products. He said he did not have enough for himself. We told him he would have enough if he did not double-feature so much. He answered us, he considered the opposition [fol. 3196] in Elmira, they double-featured, therefore, he had to double-feature.

Q. Was anything else said then?

A. We asked him—he asked us if we would sell him the theatre, and we told him that we had to make a living, and we did not know what we could do. We asked him—

we would trade him the theatre if he could give us some situation that perhaps was too small for him, and Mr. Schine did not know of any at that particular time. He said he would get in touch with us if he did know of a situation like that.

Q. With reference to second-run product, had you attempted to negotiate with the major film companies for major product?

A. Well, we did that. Practically every time they sold us a contract, we would say "Here is a town of 16,000 people. We have to run third-run."

Mr. Rogers: I move to strike it out, may it please the Court. It is not responsive. The question is whether he negotiated for the product.

The Court: Yes, it is too general.

Q. Can you recall any particular conversation with any particular major distributor where you discussed the possibility of getting the second-run?

A. The only way I could answer that, every time I bought [fol. 3197] a product, I yelled murder with all the distributors.

Mr. McClennen: May that be stricken out?

The Court: Yes, that is not responsive.

Q. Listen carefully to the question and see if you can answer it.

(Question read.)

A. Yes, I can.

Q. With whom?

A. Well, with Ted O'Shea of Metro-Goldwyn-Mayer.

Q. When?

A. I would say during the time that he was manager, and that this situation existed. I mean, various managers would change from time to time.

Q. During that time what was said by him and by you with reference to a second-run for Corning?

Mr. McClennen: The usual objection.

The Witness: He told us that they did not sell Schine, that Schine bought in New York, and when they came down to sell me, that is what he had to sell me, and it was to follow Schine theatres, that is the only way he could sell me.

Q. Any other major representatives that you can remember of having a conversation with?

A. Sidney Samson of Fox.

[fol. 3198] Q. When was it you talked to him?

A. About that same time.

Mr. Rogers: Can't we get a date here?

The Witness: You see, I am not a lawyer. Practically every contract——

Q. Just give us the best——

A. Every contract I made——

The Court: The Schine took over the Palace in 1938; now, when was this?

Q. When you talked to Samson of Fox, was this before or after or before and after? We are trying to fix the time when you had these talks with him about second-run for the Plaza?

A. When this condition existed that the best we could get was third-run——

Q. That would be the period of 1933-34 right through 1940-41?

Mr. McClennen: That is objected to, right through, leading question.

The Court: State when it was.

The Witness: When the Schine Enterprises took the theatres back from Fox and we immediately had to run third-run, and we had to follow the State Theatre, especially since we were charging either the same or over what the [fol. 3199] State was charging. It seems there was a conflict going on between the Schine and the Palace.

Mr. Rogers: That is not responsive, may we have it stricken out?

The Court: Yes.

Q. I am just trying to fix the time of the conversation you had with Mr. Samson. Did you talk to him after you went to third-run or at the time you went to third-run?

A. Yes, the only way we could buy them was third-run.

By the Court:

Q. What did Samson tell you?

A. Samson told us the same thing. He said "We don't make the deal with Schine Enterprises; that is made in

New York. We have this to sell and it is to follow Schine as available. If it is third-run, it is third-run; if it is fourth-run, it is fourth-run; and if it is second-run, it is second-run; the pictures he doesn't play second-run, you can have the second-run."

Mr. Rogers: We don't have the date of the talk with Ted O'Shea and the talk with Samson. If we are to meet the situation, we must have the date.

The Court: Did you talk with him at the time you played third-run?

[fol. 3200] The Witness: Yes.

The Court: About 1935 or '36?

The Witness: 1935 or '36.

The Court: You had second-run except Columbia?

The Witness: Yes.

Q. Anybody else besides Mr. O'Shea and Mr. Samson?

A. Mr. Miller, Universal.

Q. Where did you see him?

A. At that same period of time.

Q. What was said by him?

A. Always the same answer, that they don't sell Schine Enterprises, that those pictures are sold out of New York.

Q. What do you mean by that, Universal films at the Buffalo office or what exchange?

A. That the deal is made either in Gloversville or in New York.

The Court: What did they mean, they didn't sell?

The Witness: I mean by that, the salesman didn't sell, this particular salesman or representative of Universal, who in this case was Otto Siegel, that he didn't sell Schine; he only received permission from Universal to sell any pictures that were available, and it was in this case third-run. If [fol. 3201] Schine didn't play them second-run, they would be second-run, and if Schine didn't play them first-run, they would be first-run.

By Mr. Wright:

Q. Did you have any other conversation with any major representative?

A. There was Harry Seed of Warner Brothers.

Q. Where did you see him?

A. That same period of time.
Q. What was said by him?

Mr. McClennen: Same objection.
The Witness: Same answer.
The Court: He hasn't got the periods very well.
The Witness: Say between 1935, 1936, 1937, after the Schine Enterprises took the theatres back from Fox.

Q. What did he tell you?
A. He told me——

Mr. McClennen: Same objection.
The Witness: As a matter of fact, he told me I was lucky to get pictures altogether. He said "Schine will pay me $25 a picture more if they don't sell you."

Q. Was there anybody else, any other major company——

Mr. Rogers: May that be stricken out as to his opinion [fol. 3202] of what Schine would do if he did not sell this witness?
The Witness: It wasn't my opinion, it was told to me.
Mr. Rogers: One moment, Mr. Witness; it is only opinion evidence.
The Court: I don't know that he may state that Schine paid $25.
Mr. Wright: He didn't say that, he said that is what Seed told him.
The Court: I know that, but I don't know that he can make a statement of that kind.
Mr. Wright: I suppose it is clear enough that Seed had authority to tell him why he could not have pictures.
The Court: Read that answer.

(Preceding answer read as follows:

"A. As a matter of fact, he told me I was lucky to get pictures altogether. He said 'Schine will pay me $25 a picture more if they don't sell you'.")

The Court: I will let it stand.

By Mr. Wright:

Q. Did you talk to anybody from Paramount or R.K.O. about second-run?

A. Yes, I think Kenneth Robinson was Manager of [fol. 3203] Paramount office about that time.

Q. What did Robinson tell you?

Mr. McClennen: Same objection.

The Court: Overruled.

The Witness: Robinson told me that their deals are made in New York. He said "We can only sell you what New York tells us to sell, and it is after Schine".

Q. Did you talk with R.K.O.?

Mr. Rogers: Who?

The Witness: What was that?

Q. R.K.O.?

A. Yes, I talked to the manager there. You see, they changed managers of the office and this condition came up every time they sold me a contract. I just recall there was either Mr. Dixon was manager or I think at that particular time Mr. Boasberg.

The Court: That would be what period?

The Witness: Between 1934, '35, '36 and '37, they changed managers very often at that time.

The Court: Do you remember talking with Boasberg?

The Witness: Yes, I talked with Boasberg. I talked with Walsh and I talked with Lux.

The Court: Did they all represent R.K.O.?

The Witness: Yes, one succeeded the other.

[fol. 3204] Q. What did they tell you?

Mr. Rogers: That is objected to.

The Court: Sustained.

Q. Can you recall what any particular one of those representatives told you?

Mr. Rogers: That is objected to.

The Court: Overruled.

The Witness: We would go into conversations, you see——

The Court: No, no. Answer the question. Do you recall what any one of these said?

The Witness: They told me they can only sell me——

The Court: That is not the question. Do you recall any conversation with any one of these agents? You started to tell about Boasberg.

The Witness: Yes. I took this up with Mr. Boasberg, and I took it up with their salesman.

By Mr. Wright:

Q. What did Boasberg tell you?
A. He told me "This is what I can sell you, and it is as available after Schine".

Mr. Rogers: May that be stricken out, if your Honor please?
The Court: I don't know.

Q. Are you familiar with the Town of Salamanca?
A. Yes, sir, I am.
[fol. 3205] Q. Did you visit that town in 1937 or '38?
A. I have a sister living in Salamanca and I always made it a point to visit her.

The Court: That doesn't answer it. It is not necessary for us to go into that.
The Witness: Yes, I did visit Salamanca.
The Court: When?
The Witness: 1937. I made visits there two or three times every year.
The Court: You were there in 1937?
The Witness: Yes, I was.
Mr. Wright: I will ask to have this newspaper marked with the next exhibit number for identification.

(Thereupon newspaper referred to was marked as Plaintiff's Exhibit No. 854 for identification.)

Q. I will show you this newspaper dated December 24, 1938, marked for identification as Exhibit 854.

The Court: What number is that?
Mr. Wright: There were a group of contracts preceding, seven contracts that Mr. Vournakis identified.
The Court: That is 847 to 852.
Mr. Wright: The last contract number was 853, inclusive. Will you read the last question?

[fol. 3206] (Last question read.)

Q. When was the first time you saw that?
A. Well, I would say it was about four or five days after this paper was printed, that it was sent to me.

Q. Now, how long before December—how recently before December 24th, 1938, had you been in Salamanca?

A. Well, I was there in 1937. I was there in 1938. I made it a point of going there every year at some particular time.

Q. Well, in December, 1938, had you had any negotiations with reference to the possible operation of a theatre there?

A. Yes, sir, I had.

Q. Those were with whom?

A. With my partner and in conjunction with—that is Mr. Morris Gaby—with my brother-in-law, who was residing in Salamanca.

Q. What is the name of your brother-in-law?

A. Mr. Zafron.

Q. How do you spell it?

A. Z-a-f-r-o-n, Jack Zafron.

Q. Do you know whether you or your brother-in-law had taken any steps to acquire a property for theatre purposes there?

A. Yes, we had.

[fol. 3207] The Court: I don't know what knowledge he has about what his brother-in-law did. He can say what was done by him.

Q. If he knows.

A. My brother-in-law took those steps. He acquired a building.

The Court: Are you speaking of your personal knowledge?

The Witness: Yes.

The Court: Were you there?

The Witness: I knew of the building being bought for that purpose.

Mr. McClennen: May that be stricken out, if your Honor please? It is obvious he is speaking of something not that he was present at.

The Court: Were you present when it was bought?

The Witness: I wasn't present when it was bought, but I was told it was bought.

The Court: Strike it out. You can't tell what your brother-in-law told you.

By Mr. Wright:

Q. Just tell us what, if anything, you, yourself, did in Salamanca with reference to the possible operation of a theatre?

A. Well, I had a conversation with my brother-in-law, and told him that——

[fol. 3208] The Court: No, no.

Q. Just tell us what you did, don't tell the conversation. Just what you did. You talked to your brother-in-law. Did you do anything else?

A. My partner and I, Mr. Gaby, were interested in putting up a theatre in Salamanca.

Mr. McClennen: May that be stricken out?

The Court: No, I will let it stand.

Mr. McClennen: It is not responsive to the question.

The Court: Strike it out.

The Witness: We made an agreement with my brother-in-law.

Mr. McClennen: If it was written, it ought to appear that way. If it was oral, it ought not be stated in conclusion form. I object to it.

The Court: Was there any writing?

The Witness: No, except the building was bought for that purpose.

Mr. McClennen: And may that last be stricken out?

The Court: Strike it out.

Q. Did you look at any property there yourself?

A. Yes, sir, we did.

Q. Did you make any investigation of theatre sites?

A. Yes, we did.

Q. When you say "we", whom are you talking about?

A. My partner, Mr. Gaby and my brother-in-law, Mr. Zafron.

[fol. 3209] Q. When did you do that?

A. About 1938, specifically.

Q. When was it with reference to December 24th, 1938?

A. I would say around October of 1938.

Q. Around October?

A. Yes, I can't name a specific day.

Q. What was it that you and Mr. Gaby did in Corning in that connection, in October?

The Court: You are talking about Salamanca.

Q. Oh, in Salamanca, yes.

A. Well, we went down, we had a conference with my brother-in-law, and we asked him to make a deal.

The Court: Not what you asked him. You started to say you went down.

The Witness: Yes, we looked over a piece of property, and we then decided that that particular piece of property was not——

Q. Not what you decided, just what you did. You looked at one piece of property. Did you look at any others?

A. Yes, we looked at another piece of property, and it was this second piece of property my brother-in-law bought.

Mr. McClennen: May that last be stricken out?

The Court: That the brother-in-law bought it may go out.

Q. Did you have any talks with any owners of any of [fol. 3210] those properties?

A. My brother-in-law had a talk.

Q. Just what you did.

A. I did not.

The Court: All right.

Q. Then after December 24th, 1938, did you or your partner or your brother-in-law build or buy a theatre in Salamanca?

Mr. McClennen: That is objected to, what he did, I think it should be limited to.

The Court: He can state what he has knowledge of. He can state whether he or others in conjunction with him purchased property there.

The Witness: I called up my brother-in-law on the telephone and asked him——

Q. You cannot state the conversation.

The Court: Did you purchase any property there?

The Witness: My brother-in-law purchased this property.

Q. The question was——

A. I did not, no.

The Court: All right.

Q. The question I asked still has not been answered. Would you read the question?

(Question read, as follows: "Q. Then after December 24th, 1938, did you or your partner or your brother-in-law [fol. 3211] build or buy a theatre in Salamanca?")

The Witness: No, we did not.

Q. Have you been back there since then?

A. Yes, I have.

Q. You were back there in 1941, 1940?

A. I was back there in 1939, '40, '41 and '42.

Q. Did you notice whether there was any other—what, if any, theatres were there in 1939 or '40?

A. Just the Andrews.

Q. That was the theatre operated by Schine?

A. Operated at the time, yes.

Q. That was the one that was there in October, 1938?

A. Yes, that was there in 1938.

Q. There were no other theatres then or in 1939 or '40, is that right?

A. No.

Mr. Wright: That is all.

The Court: Was there any other theatre, when you speak of 1939 or '40?

The Witness: No, there was just the Andrews. I thought there was going to be.

The Court: All right. All right. Cross-examine. Is there any cross-examination?

Mr. Rogers: I beg your pardon. I did not know Mr. [fol. 3212] Wright was finished.

Mr. Wright: Yes.

Cross-examination.

By Mr. Rogers:

Q. I believe that you testified that you had Warner product first-run for the season 1932-33, is that right?

Mr. Wright: I thought he said 1931-32.

The Court: What do you say now?

The Witness: I would say it was after Fox took over from Schine.

Q. No, please answer my question.

The Court: Did you say 1931-32 or 1932-33?

The Witness: I could not just say the exact time, I know that situation existed about that time, but I could not say the exact time.

Q. One moment, you can't state definitely whether or not you had Warner?

A. After Fox——

Q. Please listen to me for a moment.

The Court: Did you have the Warner product in 1932, did you say, was that the question?

Mr. Rogers: Yes.

The Witness: We had the Warner product after the Fox took over from Schine. I can't say the exact time there, [fol. 3213] but at that time we had it. Now, that is the only answer I can give you truthfully.

Q. Let me ask you something. How much time did you devote to the Plaza Theatre in Corning in 1932?

A. Well, I lived in Hornell which was 40 miles away, and my partner and I——

Q. I am asking you a simple question; how much time did you devote to the Plaza Theatre in Corning in 1932? Just answer that question.

A. I devoted some time.

Q. About how much time, how often were you there in the theatre?

A. Two or three times a week.

Q. Every week?

A. Practically every week, yes, there was some exceptions.

Q. Who did the buying for that theatre in 1932, you or your partner Gaby?

A. Both Mr. Gaby and myself. Sometimes I would buy contracts for Corning and Hornell, and sometimes he would buy for Corning and Hornell, all depends where the salesman happened to be.

Q. Primarily, didn't Gaby doing the buying for the Plaza at Corning?

A. Yes, sir.

[fol. 3214] Q. Didn't he, primarily, speaking?

A. Depended who saw the agent and salesman, we both did.

Q. Didn't he primarily do it for the Plaza?

A. We both did. I would rather answer that way.

Q. In 1932, who was the man who really ran the Plaza?

A. Mr. Gaby.

Q. In 1933, who was the man who really ran the Plaza?

A. Mr. Gaby. When we made our deals——

Q. Just answer the question, don't babble on. Of course, when you testified to the prices of admission at the Plaza Theatre, did you testify of your own knowledge or just what you thought?

A. Why, prices changed during the course of that time.

Q. No, answer my question. I am asking a very simple question. Now, you gave us a lot of testimony that the prices of admission at the Plaza Theatre were certain figures.

A. I would say as I thought.

Q. Merely as you thought?

A. Yes.

Q. Not of your own knowledge, is that right?

A. It is 13 odd years; I knew what they were at the time they existed.

Q. Will you please stop and answer the question?

The Court: Did you know about the price yourself?

The Witness: I knew about the price, yes.

[fol. 3215] By Mr. Rogers:

Q. Those prices you testified to are accurate prices, is that right?

A. To the best of my knowledge right now.

Q. What prices of admission were you charging at the Plaza Theatre in 1933?

A. 1933, I would say, 25 cents.

Q. What prices of admission were you charging at the Plaza Theatre in 1934?

A. Well, either 25 or 20, after Schine came back and we had to run third-run——

Q. Please answer my question.

The Court: Twenty-five or thirty?

The Witness: Twenty-five or twenty.

Q. Either 20 or 25 cents, is that right?

A. Yes.

Q. Now, let me show you an advertisement in the "Evening Leader" or Corning, New York, under date of March 6, 1934. Is that the ad of your Plaza Theatre?

A. Yes, it is.
Q. What price does that show?
A. That is a family night. That says ten cents.
Q. What prices does that show?
A. That was ten cents.
Q. It says, "Ten cents, all seats"?
[fol. 3216] A. Yes, on that particular night.
Q. On that night?
A. Yes.
Q. Only that night?
A. It wasn't our general price.
Q. What price of admission were you charging in 1935?
A. That general condition existed in 1935, too.

The Court: Just answer the question.

A. I would say our general price at that time was 20 cents. On Thursday we had a Bargain Night, which we charged ten cents.

Q. Let me show you the Evening Leader or Corning of February 27, 1935. Is that your ad for the Plaza Theatre?
A. Yes, it is.
Q. What is the price of admission?
A. That is ten cents. That is a Bargain Night we had at ten cents.
Q. Where is there anything there about a Bargain Night in the ad?
A. Well, that is what it was.
Q. There is nothing in there about a Bargain Night, is there, in that ad?
A. I don't see where he had "Bargain Night." He said, "Tonight all seats ten cents." Just tonight.
[fol. 3217] Q. You say that was usual on Thursday nights, is that right?
A. Yes, as a rule, unless perhaps at that time——
Q. This is Wednesday night, isn't it?
A. Yes, that is Wednesday night.
Q. So the rule did not prevail, did it, that night?
A. Why he changed that particular time, it may have been Wednesdays.
Q. You testified before your price was 25 cents and 20 cents in 1934. I show you the Evening Leader, Corning, Tuesday, May 8, 1934. Is that your Plaza ad?
A. Yes, it is.
Q. What is the price of admission?

A. That is ten cents.

Q. You notice in that ad, it says, "Tonight, Wednesday and Thursday, ten cents," do you?

A. Yes.

Q. There was nothing special about that, was there?

A. (No answer.)

Q. I show you ad of the Plaza Theatre in the Evening Leader, Corning, Wednesday May 16, 1934. Is that your ad of the Plaza Theatre?

A. Yes, it is.

Q. What is the price of admission?

A. Ten cents.

Q. Nothing special about that, was there?

[fol. 3218] A. I can recall now why that was. There was a reason for that.

Mr Rogers: That is all

Redirect examination.

By Mr. Wright:

Q. Just one question. You said there was a reason for this ten cent price. Can you tell us what that was?

Mr. McClennen: That is objected to.

The Witness: When Schine went to fifteen cents at the State——

The Court: Just a moment.

Mr. Wright: On the cross-examination, the last ten-cent admission in May, 1934, Mr. Rogers, asked him if there was anything special about it, and he said there was a reason for it.

The Witness: When Schine went to fifteen cents at the State and we had to run after him, in desperation, my partner went ahead with ten cents for a limited amount of time.

Mr. Rogers: I move to strike that out, may it please the Court.

The Court: What the partner did is not responsive. What was done by the company.

Mr. Rogers: May that be stricken?

[fol. 3219] The Witness: There was only certain product we could run at that price. Major products, they wouldn't let us run at that price.

The Court: The statement about the partner is stricken.

Mr. Rogers: May I have these contracts marked for identification?

Mr. Wright: Are those contracts which were previously identified? If they are identified, they are identified. They don't need to be marked again. It will just confuse it. There is no use of re-marking them.

Mr. Rogers: I beg your pardon. They have been identified.

The Court: What time do you want to get away?

Mr. Wright: As far as we are concerned, we will go as late as your Honor wants to go. I don't know about these other gentlemen.

Mr. McClennen: I think some will have to leave at four, if your Honor please.

The Court: All right. We will recess until two o'clock.

(Thereupon a recess was taken until 2 p. m.)

[fol. 3220] After recess, 2 o'clock P. M.

Appearances: As before noted.

Mr. Wright: If the Court please, I just got a telephone call from Mr. Berge, at Washington, to the effect that the Clerk of the Supreme Court has taken the Crescent case off the call, and put it over until November 6th and 7th. We had arranged an adjournment here with all counsel and excused witnesses until next Monday. I don't know what we can do about it.

The Court: Well, I hate to waste the time. Can you not get some witnesses here tomorrow?

Mr. Wright: I do not think we could go ahead tomorrow. We might be able to go ahead on Friday.

The Court: Today is only Tuesday.

Mr. Wright: That is right, but we had a schedule made up for next Monday and Tuesday, and I don't know whether we could get those people in here again before that or not. I had an appointment in Washington in any event for tomorrow myself, and I want to take a trip down there. I understood all other counsel in the case had made prepara-

[fol. 3221] tions to leave then. I did not understand they were being held here. It is a situation over which I had no control.

The Court: What are your wishes about the matter?

Mr. McClennen: Well, if Mr. Wright could arrange to go ahead, why, we could cancel and stay. If we are not to

go ahead tomorrow, then we would not want to sit around and wait for Thursday and Friday. Either go ahead tomorrow or next Monday.

The Court: He says he has to be in Washington tomorrow.

Mr. Wright: That is right, your Honor.

The Court: Well, I think under the circumstances when we adjourn today, we will adjourn until next Monday.

Mr. Wright: Mr. Tishkoff, take the stand.

Mr. McClennen: Before Mr. Tishkoff takes the stand, we should like to offer these contracts as a part of Mr. Cohen's cross-examination. They are taken from identification number 637, which was a large group of Warner contracts, and they are the contracts for the Plaza, as follows: The First National Productions of the 1931-32 season to the Plaza second-run.

[fol. 3222] The Court: What year is that?

Mr. McClennen: 1931-32 second-run, and the Warner productions for the same year, 1931-32 to the Plaza second-run; the First National 1932-3 productions to the Plaza second-run, and the fourth one, the Warner productions contract for 1932-33 productions to the Plaza second-run.

The Court: What run?

Mr. McClennen: All second-runs.

Mr. Wright: If the Court please, we have no objection to the contracts going into evidence. I don't quite understand what counsel means by having them go into evidence as part of Mr. Cohen's cross-examination. If they are offered for the purpose of impeachment, they should have been drawn to his attention at the time he was testifying, as evidence of what was played there, we have no objection to that.

Mr. McClennen: If there is no objection to their going in, we need not insist that it be part of the cross-examination. It will be convenient to have them in the record at this point, that is in the order that I have noted.

[fol. 3223] The Court: I thought they were identified.

Mr. McClennen: They were from identification 637, and they become exhibits in that order.

The Court: You say they are from 637?

Mr. McClennen: 637 was a great bulk of First National contracts. It doesn't identify any particular paper at all.

(Thereupon the four contracts referred to, were received in evidence and marked as Plaintiff's Exhibits 637-A, B, C and D, inclusive.)

WILLIAM TISHKOFF, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Mr. McClennen: I did not realize Mr. Tishkoff was coming forward. If your Honor please, for convenience, in juxtaposition to these there should be the four contracts also from Exhibit No. 637 for identification, which are the First National 1931 production first-run to the *to the* Fox or Palace Theatre; the next, the Warner productions for the 1931-32 season, first-run, to the Fox or Palace Theatres; [fol. 3224] the third one, the First National Productions, 1932-33 to the Fox or Palace, first-run; and the fourth one, the Warner productions, 1932-33 to the Fox or Palace first-run.

The Court: They may be marked E. F, G and H.

Mr. McClennen: That is right, sir.

(Thereupon the four contracts referred to were then received in evidence and marked as Plaintiff's Exhibits 637-E, F, G and H.)

Direct examination.

By Mr. Wright:

Q. Mr. Tishkoff, have you been sworn?

The Court: Yes, he has.

Q. Where do you live?

A. Rochester, New York.

Q. What is your occupation?

A. Theatre manager and owner.

Q. What theatre?

A. Not at the present.

The Court: What?

The Witness: I am not at present occupied in the theatre.

Q. You were a theatre manager and owner up to when?

A. Up to last January 26th.

[fol. 3225] Q. What theatre?

A. The Murray Theatre.

Q. That is at Rochester?

A. Rochester, New York.

Q. How long did you own and manage the Murray Theatre?

A. 24 years.

Q. Where is that theatre in Rochester?

A. At 218 Murray Street, near Lyle Avenue.

Q. Do you know where the State Theatre is in Rochester?

A. Yes, sir.

Q. Where is that?

A. That is across the city from the Murray Theatre.

Q. Can you give us any more accurate location than that?

A. *Between* three miles east of the Murray Theatre.

Q. About three miles east?

A. Yes, sir.

Q. I call your attention to the year 1927, were you then interested in or engaged in the construction of a theatre in Rochester near the State?

A. Yes, sir.

Q. What theatre was that?

A. The Webster Theatre.

Q. How far away from the State was it?

A. Between three-quarters of a mile to a mile.

The Court: What year?

[fol. 3226] Mr. Wright: 1927.

Q. Who was associated with you in the construction of that theatre?

A. Four partners besides myself.

Q. Who were they?

A. Mr. Robfogel, Jacob Robfogel, and Joseph, a son of the same name.

Q. Did you name all of the four?

A. Mr. Frederick Bieger, Max Fogel and myself.

Q. Who was going to operate the new theatre when it was built?

A. The five of us under the organization of a corporation.

Q. What is the name of the corporation?

A. Bemat Amusement Corporation.

A. After construction of the Webster Theatre was started, did you have any conversation with Mr. Myer Schine about it?

A. Yes, sir.

Q. How long after construction was started was that?

A. Just a few weeks.

Q. Where did you see him?

A. Mr. J. Myer Schine, John A. and Schafer called at the office of the Murray Theatre.

Q. The office of the Murray Theatre?

A. Office of the Murray Theatre.

[fol. 3227] Q. Who else was present besides yourself?

A. Mr. Fogel.

Q. What was said then?

A. Mr. Schine inquired if we are building a theatre at that location on 314 Webster Avenue. We told him that we are doing so at that time.

Q. What else was said?

A. What did you say?

Q. What else was said?

A. Well, Mr. Schine expressed himself that the location is not appropriate for a theatre. It is too near the State Theatre, and it is not justified to be built there.

Q. What did you say?

A. We told him that according to the time and investigation that was put in prior to the decision of building, we thought that the theatre is justified to be built there.

Q. Was anything else said?

A. Well, the visit lasted approximately an hour, and many things were said at the time, but as I can recollect, Mr. Schine expressed himself that it is unjustified, and they, therefore, will build a theatre near the Murray Theatre as a matter of penalty of some kind or other.

Q. What did you say about that?

A. Personally I expressed myself that as far as—speaking strictly for myself, it was not so important to me, that [fol. 3228] I would divorce myself from my investment and offer to transfer my personal investment to Mr. Schine at the cost at the time to me.

Q. Personal investment of what?

A. Approximately $40,000.

Q. In what?

A. In the new Webster Theatre.

Q. In the Webster construction. Was that offer accepted?

A. He refused.

Q. Was there anything else said at that time with reference to your theatre, the Webster or the Murray or the State?

A. At that time we expressed ourselves to him, if another theatre would be built on Lyell Avenue, nearby ours, it naturally would hurt our business, and probably put us out of business. That was made in the form of an appeal, and naturally we did not get no answer to that.

Q. When was the next time you saw Mr. Schine in connection with that Webster Theatre?

A. Mr. Fogel, about two weeks later came to me and expressed himself——

Q. Don't give the conversation between you and Mr. Fogel. What I asked you was——

A. About two weeks later.

Q. The next time you saw Mr. Schine. That was about——

A. Two or three weeks later.

[fol. 3229] Q. Where was that?

A. That was in the Seneca Hotel, I believe, the first meeting.

Q. At Rochester?

A. Rochester, New York.

Q. Who else was present then?

A. Mr. Schafer was present. Mr. Fogel was present, and one of the Robfogels was present. I believe it was the son.

Q. What was said at that meeting?

A. What is that?

Q. What was said there?

A. A proposition was made to us that we enter into a partnership of operation on the Webster Theatre with Schine.

Q. Did you do that?

A. Yes, sir.

Q. Was the corporation then formed to operate it?

A. Yes, sir.

Q. What was the name of that corporation?

A. The Webster Theatre Corporation.

Q. That was owned half by you and Mr. Fogel and your associates——

The Court: Had it been organized at this time or hadn't it?

The Witness: It was organized at that time, sir.

The Court: Before you had this talk with Mr. Schine or [fol. 3230] after that?

The Witness: The theatre?

The Court: After this talk with Mr. Schine or before was the corporation organized?

The Witness: After the talk with Mr. Schine.

By Mr. Wright:

Q. You say the Webster Theatre Corporation was the operating corporation?

A. That was the operating corporation for the theatre.

Q. And the Bemat Amusement Company you have described before was the owning corporation?

A. That was the owning corporation for the building.

Q. The theatre building on completion was leased to the Webster Theatre Corporation?

A. Yes, sir.

Q. That corporation was one in which you and your associates who built the theatre had a half interest?

A. Yes, sir.

Q. And Mr. Schine, his companies, had the other half interest?

A. Yes, sir. It is only Mr. Fogel and myself and Mr. Schine had the interest in the operating of the theatre.

Q. You and Mr. Fogel owned half?

A. Yes, and Mr. Schine and his company owned half.

Q. The theatre was managed by whom?

A. By Mr. Fogel.

[fol. 3231] Q. Who bought the films for it?

A. Schines Company in Gloversville bought and booked the film—bought the film, rather.

Q. How long did that arrangement continue, if you know?

A. Until 1932, five years.

Q. Then Mr. Schine's interests were turned back to you and Mr. Fogel?

A. Well, I have to explain. It wasn't really turned over. It was—we had another meeting at that time, and Mr. Schine pointed out to our Bemat Amusement Corporation partnership that the rent was too high, and in 1932, I believe it was minimized.

Q. It was reduced?

A. Reduced to about $14,000 if I correctly remember. I have no records of that.

Q. How long did you continue to operate under the reduced rental?

A. Well, we needed money to put in the operating of the theatre, and naturally it was refused by Mr. Schine, and his company——

Mr. McClennen: Just a moment. May that be stricken out?

The Court: The "naturally" may go out. You needed money for what?

The Witness: For the operation, future operation of the theatre company, and the money was refused and the part-
[fol. 3232] ship——

Mr. McClennen: May that be stricken out? There isn't a question that calls for that.

The Court: That is true. The latter part is not responsive. You needed money, you said for the operation?

The Witness: Operation. We were short of money.

The Court: Operation by the Schine company?

The Witness: By the Schine and ourselves.

The Court: You had the rent?

The Witness: Rent.

The Court: The rent was not enough?

The Witness: It was not enough to meet the rent.

Q. Was the lease defaulted?

A. The lease was defaulted and measures taken to collect it, for the rent.

Q. What happened to the operation of the theatre?

A. Then the Company that built the theatre operated the theatre with us.

Q. That is the Bemat Amusement Company?

A. The Bemat Amusement Company.

The Court: You say "with us"?

The Witness: With us, Mr. Fogel.

Q. By "us," whom were you referring to?

A. Mr. Fogel and myself.

[fol. 3233] Q. Mr. Schine then had no further interest in the theatre?

A. No.

Mr. Wright: That is all.

Cross-examination.

By Mr. McClennen:

Q. This $20,000 rent was paid by the operating company to the Bemat Company as the owner of the property, is that right?

A. It was paid, the $20,000, in the form of future rent to be deductible each and every year on an equal basis.

Q. That is, the $20,000 that was paid went to your Mr. Fogel and your associates' interest in the Bemat Company?

A. Yes, sir.

Q. They were tenants at that rate of rent, is that correct?

A. Please repeat the question?

(Question read.)

Q. That is, the Webster Theatre Corporation was the tenant at that rate of rent?

A. That is right.

Q. So that that $20,000 did not go to the Schine interests in any way?

A. No, sir.

Q. Then, in figuring out the profits or losses of the Webster Theatre Corporation, of course, that rent was one of the [fol. 3234] items of expense, is that correct?

A. Yes.

Q. Then that and all the other operating expenses being taken out, if there was any profit, that went half to you and Mr. Fogel and half to the Schine interests?

A. That is right.

Q. And in the operation the Webster Theatre Corporation sustained a loss of about $15,000?

A. I couldn't commit myself to the figures. I was not in charge of the operation.

Q. You were apprised at the time of the fact of what the losses were, were you not?

A. I was not.

Q. You did not know at all?

A. I knew approximately at that time.

Q. At that time?

A. At that time.

Q. But you have now forgotten what the amount was?

A. I have forgotten. The books are in existence somewheres.

Q. In connection with the operation of the theatre, to make up the needs of the Webster Theatre Corporation for a time you and Mr. Fogel made some contributions, did you?

A. Yes, sir.

Q. How much did you make?

[fol. 3235] A. On the Schine's operation, from 1927 to 1932, on my part about $5,000 to $6,000, I believe.

Q. For the original starting, the Schine interests furnished some $10,000?

A. Yes, sir.

Q. And when the Schine interests were given up in 1932 or 1933, or whenever it was, nothing was paid on account of that $10,000, is that right?

A. You mean returned to Schine interests?

Q. Yes.

A. No, correct.

Q. So that they were out in that operation $10,000, and they were out such losses as had taken place in the interval?

A. Yes.

Q. The actual operation of the theatre in this period from 1927 to 1932 was in charge of Mr. Fogel?

A. Yes, sir.

Q. And all that the Schine organization had to do with it was the buying of the pictures?

A. Yes, sir.

Q. Now, the conversation that you had with Mr. Schine and his associates was upwards of seventeen years ago?

A. The spring of 1927.

Q. In the spring of 1927?

A. Yes.

[fol. 3236] Q. And you made no memorandum at that time of that conversation?

A. I remembered every word of it.

Q. I say, you made no memorandum?

A. No written memorandum.

Q. You wrote no letter in which you recited what that conversation was at that time?

A. At that time I didn't.

Q. So that your statement of the conversation is purely an act of memory of seventeen years ago?

A. Yes, sir.

Q. And you say the conversation lasted how long?

A. Approximately one hour.

Q. And the conversation at that time was to a considerable extent on the folly or wisdom of the building of a theatre so near an existing theatre?

A. Yes, sir.

Q. And Mr. Schine's main conversation was in pointing out to you that from a business standpoint it was an unwise move?

A. Yes, sir.

Q. Now, in five years do you bear in mind in the aggregate how much in all was lost in that undertaking?

A. I couldn't say.

Q. Were there any other theatres at that time in that [fol. 3237] immediate locality?

A. Between the State and the Webster there was a Plaza Theatre.

Q. Was it in operation?

A. I cannot recollect, I believe it was.

Q. Do you know who were the people interested in the operation?

A. I can't recollect.

Q. Was the matter of the Plaza Theatre mentioned in the conversation?

A. I do not recollect it, sir.

Q. You mean your mind is barren as to whether it was or wasn't?

A. That is right.

Q. You don't know?

A. No.

Q. How large a theatre was that Plaza?

A. A few seats over 500, I should say between five and six hundred seats.

Q. Did the building of the Webster have the effect of putting the Plaza out of business?

Mr. Wright: If the Court please, I suppose that is a conclusion he isn't competent to draw.

Q. Did the Plaza Theatre close up soon after 1927 or in 1927?

[fol. 3238] A. I can't recollect the operation of the Plaza at the time, how it was, and I know as a building there was a theatre, but whether operating or not, I do not recollect, sir.

Q. And you do not recall when it ceased operating?

A. I do not.

Q. You do not recall whether it was in a year after the completion of the Plaza,—or the Webster Theatre?

The Court: Do you know whether it was closed within a year after the Webster? Do you know whether the Plaza was closed within a year after the Webster was started?

The Witness: I could not commit myself to time. If I could recollect I could say when it was open or closed. I know it was open and closed several times.

Q. Do you remember that the Plaza had been completely remodeled just before you started the construction of the Webster?

A. I do.

Q. Had it?

A. Yes, sir.

By the Court:

Q. How far was the Plaza from the Webster?

A. Exactly in the center between the State and the Webster, dividing three-quarters to a mile in half.

[fol. 3239] Q. Three-quarters of a mile from each then?

A. No, it would be less, it would be in the center between the two. The State is there (indicating) the Webster is here (indicating) and the Plaza is here.

Q. What is the difference?

A. Less than half a mile from each.

By Mr. McClennen:

Q. That is, the Plaza was between the Webster site and the State?

A. Yes, sir.

The Court: Did you say, do you know who owned the Plaza at that time?

The Witness: No.

The Court: Some independent company?

The Witness: Some independent man that moved to California. That is all I recollect about that man.

By Mr. McClennen:

Q. Now that you have spoken of this remodeling so recently completed, before you started the Webster, doesn't that recall to your mind that the Plaza was also mentioned

in this conversation as a reason why it was not prudent to build the Webster?

A. I do not recollect, sir.

Q. You say that Mr. Schine expressed a willingness to [fol. 3240] relieve you of the expense that you had been put to and the obligations on the Webster?

A. Mr. Schine did not enter into any conversation on the offer. I personally offered to Mr. Schine to dispose my interests to him, which he refused.

Q. When was this?

A. At the end of the visit at the Murray Theatre office.

Q. In the spring of——

A. 1927.

Q. 1927?

A. Yes, sir.

Q. Your interest to him in what?

A. In the new venture of the Webster Theatre.

Q. And how much did you offer to dispose of that interest for?

A. My part, the same amount as what I invested shortly a few weeks before.

Q. That amount was how much?

A. Approximately $4,000.

Q. Approximately $4,000, and did Mr. Schine make any proposal to you as to what he would pay for your interest?

A. He refused to buy it. He wasn't interested, he said.

Q. He wasn't interested?

A. At all.

Q. To buy at all?

[fol. 3241] A. No.

Q. Was there any discussion in your presence about the buying of Mr. Fogel's interest in the venture in 1927?

A. No, sir.

Q. Now, did you conclude that it was a good business venture to build a new theatre so near to the newly remodeled Plaza?

A. I wasn't well acquainted with the choice of location.

Q. You observed as the matter went forward that it was not a prudent piece of business with the Plaza newly remodeled right there, did you not?

A. I did not.

Q. Did you give any conisderation to that question of whether it was a good business venture to do that under those circumstances?

A. Yes, sir, I did.

Q. And did you reach any conclusion?

A. Yes, sir, I did.

Q. Did you reach the conclusion that it would be apt to hurt the business of the newly remodeled Plaza?

A. I think I did.

Q. Now, the reference which Mr. Schine made to the Murray Theatre was in this form, was it not, that it would be no wiser to go ahead with the building of this Webster Theatre than it would be to build a theatre near the Murray [fol. 3242] Theatre?

A. By comparison, yes, sir.

Q. And that is substantially all that he said on that subject?

A. And many other things.

Q. That is substantially all he said on that particular subject?

A. Yes, sir.

Mr. McClennen: That is all.

By the Court:

Q. What street was the Webster on? I have forgotten about the Webster. What street is the Webster on?

A. The Webster is at 314 Webster Avenue. The numbers begin on Main Street. It is not far from Main Street.

Q. Is that on the west side?

A. It is on the north side off Main Street. The State is on the east of Main Street.

Q. East of East Main Street?

A. East of East Main Street, and the Webster is north of the same Main Street, this way (indicating).

Q. What street is the Schine Theatre on?

A. Schine State?

Q. What street is that on?

A. The Dixie?

Q. The Schine theatre?

A. The State?

[fol. 3243] Q. Yes.

A. It is on Main Street, East.

Q. The Murray and Plaza are where?

A. The Plaza is in between the State and Webster on Webster Avenue, nearby Main Street, I should say in numbers up to 120.

Q. The Schine was on Main Street, and your theatre was——

A. Off Main.

Q. About 300?

A. The Webster is 314 Webster Avenue.

Q. Is that a residential section out there?

A. Strictly residential, not many stores. Main Street is a better avenue.

The Court: All right.

Redirect examination.

By Mr. Wright:

Q. This $10,000 that Schine put up when he got the half interest in the Webster Corporation, do you know what form that contribution took, or what that was for?

A. It was for advance rent, $20,000 to be applied at the rate of $4,000 per year for a five-year period.

Q. That $20,000 advance rent, half was advanced by Schine and the other half by you and Fogel?

A. $10,00 was advanced by his company and the other [fol. 3244] half by us.

Q. And that was applied on advance rental?

A. It was given to the Bemat Corporation as advance rent.

Q. In this one-hour conversation you had, was there anything said about buying product for these theatres?

A. At the Murray office?

Q. Yes, in that conversation?

A. The conversation was, it was pointed out to Mr. Schine if he builds a theatre so near the Murray, it would probably put us out of business because of his buying power and better conditions, he can command from the film companies.

Mr. Wright: I think that it all.

The Court: That is all.

Mr. Wright: If the Court please, we have no more witnesses today. We have a considerable amount of documentary material, though. I think I can spend the time offering that. These are all documents which have been previously identified. I believe they have photostats of all of these previously identified material.

The Court: Is there any question raised about any of these?

Mr. Wright: Well, I suppose the only way to find out is [fol. 3245] to offer them.

The Court: I didn't know whether they had gone over them.

Mr. Wright: They are familiar with the material. I suppose they may have objections to admitting some of them.

The Court: Proceed.

Mr. Wright: The first document I want to offer is Exhibit 192 for identification, which is the contract between the Schine Enterprises Corporation and Fox Company for the exhibition of pictures in their Kentucky, Ben Ali, Strand and State Theatres, at Lexington, for the 1936-37 season. I take it there is no objection to that.

Then I want to offer in evidence the contracts that were previously,—or,—rather the letters which were previously offered while Mr. Schwartz was on the stand with respect to Lexington; particularly the letter to Mr. Grady, the Fox Branch Manager, which was marked as Exhibit 209, and with that, I want to offer Exhibits 200, 201 and 202 for identification, which is correspondence between Grady and Sussman. 200 is relating to the admis- [fol. 3246] sion price situation in Lexington, and 201 is a letter from Sussman to Mr. Myer Schine regarding it, and 202, which is Mr. Schine's reply.

Mr. McClennen: These are objected to, if your Honor please. These letters I haven't read at all, but they might well call for explanation and amplification from the witness.

The Court: Why weren't they offered when Mr. Schwartz was here?

Mr. Wright: We did offer this letter from Mr. Schwartz, pointing out that this gave notice to Fox as to what the admission prices that were being charged in the theatres there were doing to his business. We also said we were going to show at that time that Fox was permitting the Schine Company to play the pictures at those low prices. Objection was made on the ground we hadn't put that evidence in. We said we would then reserve until later putting in the evidence of what transpired between Fox and Schine, which, of course, was something the witness on the stand could not be examined about, and that is the evidence that [fol. 3247] is being offered now as to what happened in that situation.

Mr. McClennen: I don't recall. I want to look at the record to be sure, but I don't recall that Exhibit 209 for identification was offered in evidence while Mr. Schwartz was on the stand.

Mr. Wright: I think you are mistaken.

Mr. McClennen: You probably have your record right here and can point to it. I have no recollection of its being offered.

The Court: What is the number of that?

Mr. McClennen: That is identification 209, dated January 17, 1938, Mr. Harry Schwartz to J. Grady, Fox Film Corporation, Cincinnati.

The Court: Have you got the record there?

Mr. Wright: I have sent for it.

The Court: You have the index to the testimony.

Mr. Wright: I have sent for the transcript.

The Court: Oh, I see.

Mr. McClennen: A rough note, if your Honor please, of one of my associates is that it was offered in evidence and excluded by your Honor.

The Court: Is the reason stated by counsel there?

Mr. Wright: That is my understanding.

[fol. 3248] Mr. McClennen: And there has been no change in the situation since?

Mr. Wright: I am now offering the documents which I think do change the situation, and those are these exhibits 200, 201 and 202 for identification.

Mr. McClennen: We have no objection to identification Exhibit 202, a letter from Mr. J. Meyer Schine to Mr. William Sussman, or rather a carbon copy of such a letter. It does not appear to be even an original carbon copy, but some copy made.

The Court: The grounds on which the objection was sustained appears, does it not?

Mr. Wright: Here is what the record says. This is page 2892.

"Q. Now, I call your attention to these three exhibits which have been previously marked,—I beg your pardon, two exhibits which have been previously marked for identification as Exhibits 209 and 259, and ask you if you wrote those letters on or about the dates they bear?

A. Yes, I wrote them.

Mr. Wright: We offer these two exhibits in *in* evi-
[fol. 3249] dence.

(Documents shown to Mr. McClennen.)

Mr. McClennen: This identification 209, I submit is open to further objection than the ordinary conversations which your Honor has admitted over our objection, or the letters which you have admitted over our objections.

The Court: Let me see it.

Mr. McClennen: It seems to me that its contents, which I show your Honor, indicates that it has nothing whatever to do with this case, nothing that affects us in any way and contains recitals which are mere hearsay, and do not assist in any way in this case or resolving it correctly.

The Court: Well, I am to understand you were receiving the Fox pictures at this time, the time of this communication?

The Witness: Yes.

The Court: I think it is competent along the lines of the showing here. I mean, this coupled up with some act by the Fox Company in that regard, I mean that Fox had refused [fol. 3250] to take any production"— I think that should be "reduction"——

Mr. McClennen: I speak with complete deference, if your Honor please. I urge that it would have no effect upon Schine in any way whether Fox let a customer off his contracts.

The Court: I will receive it and see what follows.

Mr. Wright: If the Court please, it isn't offered for the purpose of showing the production"—that should be "reduction"—"it was offered for the purpose of showing that direct attention was brought home, knowledge was brought home to the Fox Company of what the admission price policy they were permitting Schine to pursue in Lexington was doing to this man's business. That is the principal purpose of the offer.

The Court: What the policy of Schine was doing?

Mr. Wright: With respect to admission prices playing a run ahead of him. I mean in their theatres, at the same price he had to charge for the later runs.

[fol. 3251] Mr. McClennen: The joker, if I may be so flippant to use that remark, in Mr. Wright's statement was that Fox was permitting Schine to pursue this policy. Fox

had nothing to do with the policy whatever, nothing to indicate that it was Schine's policy.

The Court: It shows a co-conspirator had knowledge of what another co-conspirator was doing.

Mr. McClennen: The statement, if your Honor please, was not that. The statement was that Fox was permitting this. There was no basis for such an assertion.

Mr. Wright: The minimum prices the exhibitors could charge were inserted in the contract. Mr. Schwartz' contract had a minimum price of 16 cents. Fox permitted Schine to play ahead of him at the same price, a procedure which could only have been calculated to ultimately achieve what was accomplished, and that is put an end to Mr. Schwartz' competition at the Opera House.

Mr. McClennen: The Fox Company did not permit it. There was never any contract by which Fox could require [fol. 3252] Schine to charge any more admissions that were charged. It was their province to determine what their admissions should be, so long as they did not violate the contract, and there is no contract that is in evidence, that can be put in evidence, that they violated that provision of any contract, so that this remark about Fox permitting this is just picked out of the blue by my brother, because he likes that form, but there is no evidence of it.

Mr. Wright: I would prefer, if the Court please, to argue the case after we have put in the evidence rather than now. As long as counsel has made the point, I feel at liberty to state what the position is.

Mr. McClennen: Our position is whether the argument be interlocutory or final, they ought to be based on evidence.

The Court: This goes to the request for a reduction of price on the Fox pictures to this witness.

Mr. McClennen: This is a request for reduction in prices this witness addressed to Fox. He wants relief from his contract as to prices.

The Court: Yes, in order to attain the end——

[fol. 3253] Mr. McClennen: That has nothing to do with Schine.

The Court: It appears to me it is competent not only as a notice to an alleged co-conspirator, but if it may appear Fox refused to make any reduction then it might have a bearing on the action in concurring with Schine.

Mr. McClennen: That is not the stated purpose of the offer. The stated purpose——

The Court: It may be one of the purposes.

Mr. Wright: That is quite right, as I understand a reduction, I think, was probably obtained. For our purpose it is immaterial whether they reduced the film rentals, or whether they didn't. We do not offer the letter for the purpose of showing what was done there. We offer the letter for the purpose of showing knowledge was brought home to Fox of the effect on his business of permitting the Schine houses to play the pictures ahead of him, at the same admission price he was charging for the later run.

Mr. McClennen: I stated what the purpose of Mr. Wright was in confident reliance on what he said, and what he said [fol. 3254] was that it was to show Fox was permitting these lower prices. The letter contains nothing——

Mr. Wright: The letter will not show that.

Mr. McClennen: Just a moment, just a moment; I have tried not to interrupt you.

As I was saying, before the unwarranted interruption, the offer was to show that Fox was permitting these lower admission prices. That was the stated purpose. We urge that there is nothing in the letter, nothing in evidence in any way to indicate that Fox did permit the lower admission prices or that they had any control over the admission prices so long as they did not violate the contract of Fox and Schine, and there is no evidence that they did, and it is now stated, meeting your Honor's suggestion of a possible purpose, that there is no claim that they did not get these reductions in contract prices which Mr. Schwartz asked.

The Court: That is what he claims now. He claims they were entitled to it because they were charging the same price for a fourth-run, third or fourth-run, that was charged for a second-run.

[fol. 3255] Mr. McClennen: There is nothing in this letter that bears on that in any way. I have made no objection to his stating what they were charging in admissions. I have made no objection to his stating what he was charging in admissions.

Mr. Wright: If the Court please, as to what transpired between Fox and Schine, we are not attempting to make any proof at this time, because we don't want to take up that time while this witness is on the stand. All we are attempt-

ing to show now is what transpired between the witness and Fox and the witness and Schine. We will later offer the Schine contracts with Fox and certain communications which passed between Schine and Fox, which we think relate to this situation, but I don't see the occasion for going into that now. It is perfectly clear that that letter is competent evidence to show that whatever facts were stated there, were brought to Fox's attention at that time.

Mr. McClennen: If your Honor please——

The Court: I think it better remain identified until we get the further connection in that respect, I mean, to show [fol. 3256] the relation between Fox and Schine.

Mr. Wright: That is agreeable to us. It doesn't make any difference particularly whether it goes in now except I was going to ask the witness some questions based on what was in there.

The Court: State what was done. Those were identified before, were they?

Mr. McClennen: There were identified before."

[fol. 3257] The Court: You started in by saying it referred to 812.

Mr. Wright: 812?

The Court: Your opening statement, you read 812.

Mr. Wright: The page number is 2892.

The Court: Are those the two you are offering now?

Mr. Wright: Yes, 209 is the number of one and 259.

The Court: What?

Mr. Wright: 209 and 259 were the letters that were offered then, and I am now re-offering 209 and 259, and I am also offering 200, 201 and 202, which were the letters I said would connect up.

The Court: I did not know whether you were making two offers separately.

Mr. McClennen: Now, if your Honor please, so far as any attempt to deal with all these letters at once, 259 for identification is dated September 30, 1937. 209 for identification is dated January 17, 1938. 202 for identification has on this copy no date, but has a receiving stamp of July 20th, with a fair indication, therefore, that it relates to 201, which is dated July 13th, 1937, which was a letter from Mr. [fol. 3258] Sussman to Mr. Schine, 202, being a letter from Mr. Schine to Mr. Sussman. They have no relation whatever to the letter that we are now discussing which is

marked 259, and is two months after Exhibits 200, 201 and 202 for identification.

The Court: I do not understand that he claims there is any connection between the one and the other. Let me see all the letters. (Court examines documents).

Mr. McClennen: I stated it, if your Honor please, because Mr. Wright stated that this showed the connection which he had said he was going to show, and I submit that it does not.

The Court: I thought when he made that statement he was referring to two of the exhibits, not these others. Mr. Sussman, who was he?

Mr. Wright: He was, as I recall, the Eastern Sales Manager of Fox, the home office sales assistant.

The Court: Well, doesn't it appear from the testimony of Mr. Schwartz the prices Schine Amusement Company was operating under? Is that in his testimony?

Mr. Wright: Yes, he testified.

[fol. 3259] Mr. McClennen: I think he testified as to the prices.

The Court: As far as the letter of Mr. Schwartz, it is competent. It is a little different question concerning these communications, Sussman and Schine. The Schine letter does no more—well, it amounts to an admission of some modification of prices, that is true.

Mr. Wright: The point is, your Honor, nothing was done about this contract violation as far as Schine was concerned.

Mr. McClennen: There was no contract violation.

Mr. Wright: Well, in any event, the low admission price that Schine was charging was called to his attention by the Fox Company, and he continued to charge it, and nothing was done by the Fox Company to keep him from charging it. He again reduced the prices the following year and the Fox Company knew of it, exactly what the effect of permitting that price policy to be followed was on Schwartz' business.

The Court: Where is the contract that indicates that the procedure was a violation?

Mr. Wright: I believe I just offered the contract that [fol. 3260] they were then operating under.

Mr. McClennen: Which number is that?

Mr. Wright: Aren't these marked in evidence? Didn't I offer 192? Yes, here is the contract.

Mr. McClennen: 192 you are referring to?

Mr. Wright: Specifically the minimum prices are stated. The admission prices of orchestra-balcony 35-25. 35-25 is written after orchestra and before balcony, but I take it that refers to the prices.

The Court: The letters from Sussman, of course, as pointed out by counsel does point attention to the claim that the contract was being violated, and there is testimony here with reference to the prices being charged.

Mr. Wright: They dropped the balcony price to 15 cents. The contract calls for a minimum of 25.

Mr. McClennen: So far as the correspondence showing any permission by the Fox Company, it shows just the reverse.

The Court: I think the notice by Sussman is clearly hearsay.

Mr. Wright: If the Court please, that is part of the business records of that corporation, which shows exactly what [fol. 3261] was done with reference to that subject matter. I think that letter is clearly competent to show how the matter came to Mr. Sussman's attention, and how Mr. Sussman happened to write the letter to Mr. Schine that he did.

Mr. McClennen: In fact, in Mr. Sussman's letter, there is nothing to indicate that the information came from Mr. Schwartz' letter, which was of a different period.

Mr. Wright: I did not say that there was.

Mr. McClennen: We are discussing the admissibility of it.

The Court: It appears that Sussman notified Schine of the alleged violation of the contract.

Mr. Wright: It further appears that Schine did nothing about it.

The Court: You don't claim do you—this letter of July 10th preceded the letter from Sussman to Schine?

Mr. Wright: That is right, and it explains how that letter came to be written.

The Court: I don't see how it is material, what Grady wrote to Sussman. Schine was notified of the claim made by Sussman, representing the producer.

Mr. Wright: Grady Statement I think is significant in [fol. 3262] calling the attention of what the effect of that policy was, not only in Lexington, but outside, and I think it is especially significant in view of the fact that Schine was permitted to continue that policy not only throughout

the rest of that season, but to repeat it again the following summer.

Mr. McClennen: There is no evidence whatever that he was permitted to do this. The protest was made by Fox.

Mr. Wright: He did it.

Mr. McClennen: I wish you would not interrupt me. I think you ought to be courteous.

It appears that if the letters were received in evidence, that on receipt of information Fox wrote to Schine and did all that Fox ought to do under the circumstances and that Schine replied. There isn't an iota of evidence that Fox permitted anything of the kind.

The Court: Well, of course, that is really beside the point. As far as this third letter is concerned my thought about that is that was material and competent here, because it is notice from an agent to the company, and anyway the [fol. 3263] Company had notice and the Company notified Schine.

Mr. Wright: That is right, but this letter goes further and states what the effect of the practice is in the area there.

The Court: I will receive them all, anyway.

Mr. Wright: I will hand them to the stenographer.

(Thereupon Plaintiff's Exhibits Nos. 192, 209, 200, 201 and 202, previously marked for identification, were received in evidence.)

Mr. Wright: We offer in evidence the contract for the next season, which I believe was——

The Court: Any number? They are not marked in evidence.

Mr. Wright: No, I will hand them to the reporter, the contract for the 1937-38 season between Schine and Fox for the Strand or State or Ben Ali Theatres, a contract which is dated October 20th, 1937, and——

Mr. McClennen: What is the exhibit number of this?

Mr. Wright: This was identified in the folder marked for identification as Exhibit 333, and I think should now be marked as 333-A.

The Court: The film contract?

Mr. Wright: Yes, this is a film contract previously [fol. 3264] identified. We offer that in evidence, as 333-A. This contract contains no minimum price restrictions whatever.

(Thereupon the film contract referred to was received in evidence as Plaintiff's Exhibit No. 333-A.)

The Court: Submit those others to Mr. McClennen.

Mr. McClennen: We object, if your Honor please, to identification exhibits 455, 456, 457 and 459. They are mostly just inter-office communications of the distributor company.

Mr. Wright: If the Court please, these deal with the admission price situation as to Metro, similarly.

The Court: The first one doesn't seem to be signed by anybody.

Mr. Wright: I think from the next letter it is apparent that is from Mr. O'Shea. You see the initials are on the bottom there.

The Court: I don't think they are competent.

Mr. Wright: I beg your Honor's pardon?

The Court: I don't think they are competent.

Mr. Wright: If the Court please, they show exactly what was done with reference to admission prices there in Lex-
[fol. 3265] ington; that Mr. Lynch attempted to misinform the company to the effect that Schwartz was charging a 10-cent price in an effort to get Metro to apparently withhold product from him.

Mr. McClennen: I submit, if your Honor please, that is a highly improper statement. They don't show that.

The Court: Why are they competent?

Mr. Wright: What business has Mr. Lynch in going to Metro and telling them his competitor is charging a ten-cent price, when obviously that isn't the fact? That is obviously one method intended to prevent Mr. Schwartz from succeeding in his operation. If Mr. Lynch could persuade Metro not to serve Schwartz with product on the theory he was a ten-cent house, that certainly would serve the purposes of Schine.

The Court: I know, but here is an agent of a company reports a situation to be so and so. The company finds it isn't so and so. Another thing about these letters, they complain as to Schine's operations.

Mr. Wright: It shows further what position Mr. Schwartz
[fol. 3266] was in. He could not reduce his price to 10 cents so that he would have a differential between the price he was charging for his run and the price at which Schine was playing the runs ahead of him, 15 cents. That in itself is

an arrangement under which Schwartz could not compete. That shows that that arrangement existed, that is, that Metro would not sell a 10-cent operation, and that Schwartz had to maintain a 15-cent price and that Lynch attempted to persuade Metro that Schwartz was not maintaining the 15-cent price so he wouldn't be served with the product.

The Court: But Schwartz wasn't reducing the price at all.

Mr. Wright: That is right.

The Court: I cannot see any connection. It is true, if shown that Metro acted upon Lynch's letter, and had done something, I mean as against Schwartz, on the basis of that claim, it would be a different thing.

Mr. Wright: I say that it shows in itself an effort on Lynch's part to get or to injure Schwartz by misrepresenting his admission prices.

[fol. 3267] The Court: Suppose he did, he wasn't doing that with the approval of his company, suppose, as a matter of fact it didn't exist.

Mr. Wright: If the Court please, I suppose there is nothing to show he wasn't doing that with the approval of his company. He held a responsible position. He was the film buyer for his company and what he said to Metro carried a great deal of weight. He was the man who bought films for the Schine Circuit and negotiated these circuit deals put in evidence here.

The Court: You certainly can't charge this act to the company by reason of this act by Lynch, because the company ascertained it wasn't so.

Mr. Wright: We are talking about different companies. Mr. Lynch is not an employee of Metro. Mr. Lynch referred to in the correspondence is the film buyer for the Schine Circuit. He is with Schine and works for Schine.

The Court: Oh, I misunderstood you all the time. I thought he was the representative of Metro.

Mr. Wright: I am sorry.

The Court: I did not remember the name. Of course, [fol. 3268] that puts another slant on the whole thing because that brings it to Schine itself. If Schine represented to the Company that these pictures were being shown at a price lower than a price at which he would sell, I was thinking all the time that Lynch was the Branch Manager and one who was acting for Metro.

Mr. Wright: No, the Branch Manager there is Booth, the Metro Branch Manager.

Mr. McClennen: If your Honor please, whether these letters were admitted in evidence or not, the outstanding thing is this reprehensible statement that an attempt was made by this man to misinform. There isn't the slightest evidence he made any attempt to misinform, and there is no chance of anything of the kind. He told, it appears, what he had learned, and the company corrected as they found it to be, but there is nothing to indicate that there was an attempt to misrepresent, and it is a part of the effort to establish a case by unfounded insinuation and not by fair construction put upon evidence.

[fol. 3269] The Court: The letter to Mr. Booth says Lynch made that direct statement.

Mr. McClennen: This is a pure hearsay statement that Lynch made the statement, but whether he made it or not is not evidence he was consciously misrepresenting a fact and no evidence to warrant it by a responsible officer.

The Court: That isn't carried out by his letter to Lynch in which he says "Evidently, George, the information you had concerning 10 cents at night for the Opera House was erroneous."

Mr. McClennen: That is exactly what I am saying, if George had made a mistake, it doesn't indicate he was attempting to misrepresent. That is not only the insinuation, but a wholly unfounded statement that ought not to be made in a court of justice.

Mr. Wright: If the Court please, I assume that Mr. Lynch's intentions are to be judged by the entire record of evidence made in this case, not by what I may say about him, or what Mr. McClennen may say about him, and we are asking you to draw the inference on the basis of all the [fol. 3270] evidence that Mr. Lynch's purpose was not a proper one.

Mr. McClennen: It was stated as a fact, as if there was something of the kind in evidence and there is nothing of the kind in evidence, such a statement ought not to be made.

The Court: What do you say about this letter?

— Well, I think these exhibits, some of them, stand on a different basis. I think they should be received; statements made by the different companies as to what Schine was doing and what Schwartz was doing, merely repetitious in part of what is in the earlier letters and show

error in the figures given. I will exclude these two and I will receive the others. The two I refer to as excluded are the letters relating to the question of charges being made by Schwartz, the two short letters there.

Mr. Wright: These are excluded?

The Court: No, let me see them. Those two are included.

Mr. Wright: As I understand it, you have admitted 455, a letter from O'Shea to Booth, dated August 28th, 1937, and 457, letter from O'Shea to Booth, dated September 1, 1937, and is it my understanding you are excluding the [fol. 3271] letter from O'Shea to George Lynch, dated November 1st?

The Court: Yes.

Mr. Wright: And what was the basis for the exclusion of that?

The Court: Well, I don't see that this letter has any significance. That is simply repetitious of what appears in the other two letters. As far as rates charged by these theatres, it already appears in evidence.

Mr. Wright: This is excluded on the ground it is merely cumulative?

The Court: Yes.

Mr. McClennen: The ones excluded are 458, 456 and 459?

Mr. Wright: And that was the same basis for the exclusion of this Exhibit 456 and 459, cumulative. The evidence there is cumulative?

The Court: Not only that. I think it goes further than that, because this is a letter between Mr. O'Shea and Mr. Booth, both of whom are connected with Metro.

Mr. Wright: That is correct.

The Court: About the conditions in Lexington, and so on. I do not see that it has any competency.

Mr. Wright: Well, I suppose to the extent what condi- [fol. 3272] tions in Lexington were is relevant, it is proper to have this statement of them, at least so far as it affects this distributor's product. I suppose the Branch Manager is the most competent man to make the statement. I take it, we put on direct proof of the conditions, and this merely reflects Metro's appraisal of them, and I suppose it would be the best evidence of that appraisal made contemporaneously and filed as part of the records of the company.

The Court: What do you think about that, Mr. McClennen, on the theory they concern the co-conspirator here? There

are several matters in that letter credited to the Schine company, also to Schwartz as well. It speaks about the bad condition at Lexington.

M McClennen: I think your Honor in excluding the three exhibits has ruled rightly. This is not the way to prove facts. These are merely hearsay statements and are of no service in the case, except if they were received as hearsay evidence of the facts stated in them. They ought not to be received at all under those circumstances. I think [fol. 3273] your Honor's ruling should be maintained.

The Court: Both these exhibits are of considerable materiality if admitted, because both of these letters refer to conduct as regards Schine. One of those, as I have said before, refers to operation by Schwartz. It seems to me that the evidence ought to come from somebody from the company itself, as to just what was done.

Mr. Wright: If the Court please, this question of whether or not it would be necessary to bring to the witness stand the man who wrote these memoranda was settled at the session last summer when it was ruled that the only connection we would require to make was to show who these people were and that the material was kept as a part of the files of the company.

The Court: This letter starts out "The reason for this letter is to explain in more detail the conditions in Lexington." The Metro Company, through its representative, is explaining what it claims to be the condition in Lexington. Shouldn't that be made by direct proof, a manager, rather than some communication made by him?

[fol. 3274] Mr. Wright: That would be an alternative way to make it. I would assume as far as the evidence is concerned, even if the manager were brought here and said he did not know anything about conditions in Lexington at the time, it would be competent to offer in evidence what he recorded with respect to those conditions in the files of the company, and that is what we are offering to show here, what the company's own records showed with reference to these conditions.

The Court: They have a right to cross-examine him concerning this letter. He has written a letter stating the conditions are bad in Lexington.

Mr. Wright: As part of their case, they are free to call him or anyone else, but as I understood it, the same question was raised last spring with reference to certain memoranda,

and your Honor ruled that it would not be necessary to call the maker of the memorandum in order to establish its competency.

The Court: Because it came from the files of the company, you mean?

Mr. Wright: What we needed to do was to show it was [fol. 3275] made in the course of the company's business and kept as part of the company's records. I take it that was the purpose, of course, in having all these distributor representatives over here and identify the material as having come from the files of the company, and identified the positions of these people mentioned in the memoranda, so that it would appear from an examination of the memoranda on their face whether or not they were made in the course of performing the company's business.

The Court: Does that apply to a communication from outside, from the business manager to the company? From what you said the ruling has been, it would apply only to the files of the company showing the action of the company itself.

Mr. Wright: Well, I think it applies to whatever the particular memoranda purports to cover. As I recall it, this question came up originally in connection with some United Artists or a United Artists memorandum, which was introduced, and I believe received in evidence in connection [fol. 3276] with the Town of Mount Vernon, Ohio.

The Court: What was that?

Mr. Wright: An inter-office memoranda, as I recall it, and it was from a Branch Manager from the United Artists. I think the exhibit number is 12. See if you can find the early exhibits there——

The Court: There is a difference between whether it relates to something that was done in pursuance of some contract or some activity of the company, or whether somebody said conditions were bad.

Mr. Wright: I don't suppose there is any question about that, if it appears that the memorandum has nothing to do with the business of the company, or outside of the—some personal affairs of the writer. That would be another matter, but I take it all of these memoranda that have been offered do, of course, expressly deal with the business that the writers and receivers were then engaged in, which is the distribution and exhibition of their company's pictures in these particular situations.

The Court: I will dispose of that. Give me these last [fol. 3277] two. I want to look up the record a little bit. At least, I want to try to be consistent. I won't dispose of it today. This one, I don't think, adds anything to the other two letters. It shows what the prices are. It simply refers to the further fact that George had made an error.

Mr. Wright: From the standpoint of materiality, I don't see that it makes much difference whether that goes in or not.

The Court: The question is whether a statement of that kind of conditions in Lexington, by a representative of the company—of course, if Mr. Lynch representing the defendant said conditions were bad, that would be a different thing, but your answer to that would be that the Metro is a co-conspirator.

Mr. Wright: That is one answer which is complete in itself, but even if they were not, if an issue in the case is what Metro thought of those conditions, then this memoranda would be the very best evidence available on that point. Of course, our case is built upon the proposition that here was a condition which was plainly not desirable [fol. 3278] from the standpoint of the distributor, and was only permitted to continue because of the power that Schine was able to exert over the distributor in that case.

The Court: Can you draw that conclusion from these letters?

Mr. Wright: Not in themselves. Of course, the question, I suppose, is never whether these questions in themselves prove anything, but whether or not they have a tendency to establish any facts upon which we would rely in proving our case, and it seems to me clearly that they do.

The Court: The only theory on which it would be competent at all is as an admission of a co-conspirator, that is all.

Mr. Wright: In addition to that, I might say our case consists of proving the course of business, or we are proving a course of business between certain independent companies and these distributors, and we also prove a parallel course of business between the same major distributors and Schine. The basis on which we expect to show that Schine used and applied its buying power to compel discriminations [fols. 3279-3282] by these distributors against its independent competitors is a comparison of the two courses of dealing, so that the facts that we are bound to prove and

on which we rely are all the facts which show what the course of business was between Schine and these distributors and between the independents and these distributors.

The Court: I understand that, but isn't your position inconsistent in this respect? You assert that the Metro is a co-conspirator, and yet it appears from these letters that this co-conspirator was complaining about acts which go to constitute a conspiracy.

Mr. Wright: Our position is that Metro and the other distributors were reluctant co-conspirators.

The Court: Oh.

Mr. Wright: That the moving force in the conspiracy was, of course, the Schine company, that they were the chief beneficiaries.

The Court: I will take this up when we come to it again.

(Whereupon Plaintiff's Exhibits previously marked for identification 455 and 457 were received in evidence.)

(Whereupon a recess was taken until Monday, October 23rd, 1944, at 11 o'clock A. M.)

[fol. 3283] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223

UNITED STATES OF AMERICA

vs.

SCHINE CHAIN THEATRES, INC., et al., Defendants

Continuation of trial before Honorable John Knight, United States District Judge for the Western District of New York, October 23rd, 1944, 11 o'clock a. m.

APPEARANCES:

Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Special Assistants to the Attorney General, and Philip Marcus, Esq., Milton Kallis, Esq., Special Attorney, in behalf of the United States.

Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homans, Esq., and Edward M. Antevil, Esq., appearing for the Defendants.

[fol. 3284] PROCEEDINGS

Mr. Wright: If the Court please, a couple of witnesses will be here to identify some newspapers, and they will be very short. I would like to have the privilege of interrupting the testimony to put them on, if that is agreeable to counsel.

The Court: All right.

Mr. McClennen: Pursuant to your Honor's suggestion, Mr. Wright sent me a list of some 90 papers that have been identified as coming from the distributors' files, which he proposes to offer in evidence. We have extensive objections to those, and instead of waiting until they are offered, and instead of reading those objections, I have handed the stenographer a copy of them, asking that they be copied into the record. I will hand Mr. Wright a copy and your Honor a copy so that they will be available for your consideration.

The Court: Where are the offers?

Mr. McClennen: Those, I take it, will come after this oral testimony.

[fol. 3285] The Court: Oh, after that.

Mr. McClennen: Yes, I simply thought I would have this available for your consideration and copied into the record at this time.

The Court: I thought if I had those I would have a chance to look them over.

Mr. Wright: We can supply your Honor with those. We had not intended to make the physical offer of the material until after we finished with the testimony.

The Court: I would like to have them.

Mr. Wright: Suppose we give them to your Honor some time today.

The Court: All right, as soon as you can.

(Document copied into the record referred to above, as follows):

"Defendant's Objections To Introduction Of Certain Papers From Distributors' Files October 23, 1944.

On October 20, Defendant's attorneys were notified by Plaintiff's attorneys, by letter dated October 19, 1944, of their intention to offer in evidence about ninety (90) papers [fol. 3286] already identified by numbers. The only proof of these which has been offered is that they came from the

respective distributors' files. It does not appear whether they came from the Branch Office files or from the Home Office files, or partly from one and partly from the other.

The defendants object that these are not admissible for the following reasons:

1. They do not come from the Defendant's files.

2. No witness is on the stand knowing anything about the creation and treatment of these papers, or subject to cross examination with respect thereto. (Court at pp. 285, 289, 298 of testimony.)

3. There is no evidence that they are true copies of originals. (This does not relate to the use of photostats. Of course, a photostat of a copy is no better than the copy).

4. ?

5. There is no evidence that they were made by the man whose name appears thereon.

6. There is no evidence that the maker signed them.

7. There is no evidence that the maker saw them in type [fol. 3287] or otherwise.

8. There is no evidence that they were sent to the addressee.

9. There is no evodence that they were seen by the addressee.

10. There is no evidence that the maker himself knew the truth of the statements contained in them.

11. There is no evidence that the statements contained in them are true.

12. The papers cannot be received as any evidence of the truth of the statements contained in them. (Wright at p. 286 of testimony).

13. There is no evidence that they were an actual part of any contract or transaction.

14. There is no evidence that the maker was authorized by the Distributor to make the statements in them. (Cases cited in defendant's Law Memorandum, Page No. 14, require their exclusion).

15. There is no evidence that they came to the knowledge of the defendants.

[fol. 3288] 16. There is no evidence that they were acted upon in any way, by defendants or the distributors.

17. There is no evidence that the Distributor in whose files they were found, was at the time, conspiring with the defendants. (Glasser *v.* United States, 315 U. S. 60. Defendant's Law Memorandum, Page 8, requires the exclusion.

18. There is no evidence that they were acts in the course of any such conspiracy.

19. They are no more than hearsay, sometimes twice, and sometimes, three times removed, and, sometimes, no more than conclusions or opinions.

These objections are confined to those applicable generally to the approximately ninety (90) papers. Other special objections to particular papers can be made only as the particular paper is offered.

E. S. McClennen, Esq., Willard S. McKay, esq., Attorney for Defendants."

[fol. 3289] MICHAEL BOUMANSOUR, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. Boumansour?
A. In Malone, New York.
Q. What is your occupation?
A. At the present time I am in the real estate business.
Q. You were formerly engaged in the theatre business at Malone?
A. Yes, sir.
Q. During what period?
A. Oh, probably between 1922 up till 1940.
Q. What was the theatre you were connected with in 1922?
A. In 1942?
Q. In 1922?
A. The Plaza Theatre of Malone.

The Court: The what?
The Witness: Plaza Theatre.

Q. You were operating it yourself, were you?
A. Yes, sir.
Q. How long did you operate it?
[fol. 3290] A. Just about the first year, about one year.
Q. Then what did you do with it?
A. I have leased it.
Q. To whom?
A. To Mr. Meehan.
Q. During what period was that?
A. Oh, that was during the period of 1923 to 1928, if I recall, not surely.
Q. Then who took over the operation of the theatre?
A. Well, I don't recall exactly what time that Mr. Meehan sold the interest of their own theatre, to the Schine Circuit, but at that time both theatres were taken by the Schine Circuit, my house and the Malone Theatre, the Grand.
Q. Those were the only two theatres in Malone?
A. Yes.
Q. You are not sure of the date, but you think it was some time around 1929?
A. About.

Mr. McClennen: 1928, he said.
The Witness: I don't recall.

Q. Schine continued to operate the Plaza for how long?
A. Well, they didn't operate it very much, except, I think, in the year 1931, if I recall, I am not sure, Schine has decided to remodel the Grand Theatre. That was approxi-
[fol. 3291] mately at that time between eight to nine hundred seats, and extend it, the theatre, to between twelve to fourteen hundred seats. At that time they opened up the Plaza Theatre——

The Court: What about the Grand? Is that the third?
The Witness: No, Grand was the original name of the——
The Court: Of which, of the Malone Theatre?
The Witness: Of the Malone, yes.
The Court: All right.
The Witness: Then, during the time that the Schine Corporation remodeled the Grand Theatre to Malone Theatre, that is formerly, increased its capacity between the—seating capacity used to be eight to nine hundred seats, and extend it to thirteen or fourteen hundred seats today, and after it was completed, then they close up the Plaza Theatre for good at that time.

Q. It was kept close- then until—that is, throughout what years?

A. Throughout the year 1936.

Q. From about 1932, or whatever time this Malone remodeling was, until the summer of 1936?

A. No, I think the remodeling just took about one season, I recall. I wasn't there myself when they remodeled it, [fol. 3292] but I think during the year 1931-1932.

Q. In 1936 it had been closed for several years, is that right?

A. Oh, yes, the Plaza was closed for several years.

Q. During all this time you continued to be the owner of the *the* Plaza?

A. Yes.

Q. Schine was operating under a lease with you?

A. Yes.

Q. That lease expired when in 1936?

A. In 1936 I recall.

Q. In the fall of 1936?

A. I am not sure of it, but it is—I think it was in September, 1936, the lease was over.

The Court: You say the lease expired?

The Witness: About that time, I think, in September, 1936.

Q. Did you have any negotiations then in the summer of 1936 with reference to renewal of the lease?

A. I think about three or four months before my lease expired, I was abroad, in Europe, and I had a letter sent to me that my theatre——

Mr. McClennen: Just a moment.

The Court: You cannot state the contents of the letter. You received the letter when you were abroad and then [fol. 3293] what happened?

Q. You came back——

A. I came back.

Q. To Malone?

A. The letter stated to me that my theatre——

The Court: No, they object to your telling what the letter said, unless you have the letter here.

Q. Just tell what you did after you got the letter, what did you do?

A. I came back to Malone and I went over and saw Mr. May.

Q. Where did you see him?

A. I saw him in Gloversville.

The Court: That was in '36, you say, when the lease expired?

The Witness: Yes.

The Court: All right.

The Witness: (Continuing:) And I think it was in '35. This wasn't '36 because Schine had another year yet to go on the lease.

By Mr. Wright:

Q. You think this was about a year before the lease expired?

A. Yes, Schine had another year to go, and they told me that my theatre——

Mr. McClennen: Just a moment.

[fol. 3294] By Mr. Wright:

Q. Confine yourself to the conversation you had with Mr. May at Gloversville. When he came back you saw him there?

A. Mr. May told me that the theatre was condemned and they were to discontinue the payment of the theatre.

Q. Of rent, you mean?

A. Of rent.

Q. What did you say?

A. I said if my theatre is condemned, then will you please give me the release of it, and finally I couldn't get the release.

Mr. McClennen: I ask to have that stricken out.

The Court: Yes.

Q. Say what the conversation was at that time. Did he tell you "Yes" or "No"? Just give us what was said as best as you can recall it.

A. At that time the conversation was that he wouldn't give me no release and he wouldn't pay the rent for the year 1935-36.

Q. Then what did you do?

A. Well, I went back to Malone and I saw my lawyer there, and he thought——

Mr. McClennen: Just a moment.

Q. Confine yourself to what you did, and after you saw [fol. 3295] your lawyer.

A. I got a check from Schine for the year.

Q. And then did the theatre stay*ed* closed, or was it open?

A. Closed.

Q. Then when was the next time that you talked to any one from the Schine Company about the theatre?

A. It was in 1939, if I recall.

Q. After '35. I previously asked you whether you had any—after you got the rent for the last year of the lease there, did you have any conversation with anybody from Schine about a renewal of the lease, or of further lease on the premises?

A. I think I did, but I am not sure now.

Q. You don't remember whether you talked to him or not, but what did you yourself do then with reference to the theatre premises prior to the time the lease expired?

A. I remodeled the theatre.

Q. When was that?

A. In 1936.

Q. Was that during the summer or when with reference to the expiration of the lease?

A. I think I started on the repair of the theatre before the Schine lease expired, a few months ahead of the time from the outside of it. All the necessary, like the boilers, the heating plant of the building, and all the necessary [fol. 3296] repairs from the outside that wouldn't harm the attendance, you see. I think it was about two or three months before the lease expired I started to remodel.

Q. How much did you spend on the remodeling, approximately?

A. All told I spent about $20,000.

Q. When was your remodeling completed so it was ready to open as a theatre?

A. About November, 1936, about that time.

Q. While you were remodeling the theatre did you make any efforts with respect to finding out what, if any, major film product you could get for it?

A. Yes.

Q. What did you do in that connection?

A. I went to Albany, and I went to see all the film exhibitors.

Q. You mean exhibitors or distributors?

A. Distributors. I found that——

Mr. McClennen: Just a minute.

The Court: They object to what you found. You have to state your conversation or the substance of the conversation.

Q. Just state what you said there and who you saw, as near as you can recall it.

Mr. McClennen: This, your Honor, is subject to a general objection.

[fol. 3297] The Court: Yes. Overruled. You saw who?

The Witness: I saw Mr. Eastman.

The Court: Who was he?

The Witness: He is Branch Manager of the Albany Paramount.

Q. Just tell us first, as nearly as you can recall it, what Mr. Eastman told you, or what conversation you had with him?

A. I told him I was pretty near ready to operate my theatre again, what kind of chance would I have to get product? Well, he said "There is always—you will get enough product because Schine is only running just so much percentage of our pictures." At that time he told me Schine has used 65 per cent of Paramount pictures of the past few years and I might have the left-over that I could operate with and I went and seen Mr. Halligan. I think his name was Halligan, the Branch Manager of R.K.O., and he told me about the same thing, along the same line.

Mr. McClennen: May the last be stricken out?

The Court: Just tell what Mr. Halligan said. Strike it out.

The Witness: Mr. Halligan told me Schine has used pretty near three-quarters of our product, there will be one-quarter of the product a couple of years back he can sell me when I will be ready to open.

[fol. 3298] The Court: Mr. Halligan was in Albany?

The Witness: Mr. Halligan was in Albany, the R.K.O. Branch Manager.

By Mr. Wright:

Q. At that time the Schine Malone Theatre was the only theatre operating in the town?

A. Yes.

Q. Go ahead. Who else did you see?

A. Then I went and seen Mr.—the Branch Manager of Warner Brothers. At that time his name was—I don't recall the name, your Honor, of this Branch Manager now.

Q. You did know him at that time. Had you done business with him before?

A. Yes. He was the old Branch Manager in the old days he was there, and he was—I can't recall his name. Anyway,——

Mr. McClennen: Just a moment.

By Mr. Wright:

Q. What did he say?

Mr. McClennen: I think this ought not to be stated.

The Court: Go ahead.

Mr. Wright: I asked him what the conversation was.

The Court: Have you a record here who the Branch Manager was?

Mr. Wright: I think we have it in the record. As I [fol. 3299] recall the record shows it was Ray Smith.

The Witness: That is it.

The Court: Is that the man?

The Witness: That is it, Ray Smith.

Q. What did he tell you?

Mr. McClennen: Just a moment. The record is that Mr. Smith ceased to be Branch Manager at Albany in February, 1935.

The Court: That is before the time stated here?

Mr. Wright: I think he said it was the fellow he talked to was the one he thought he bought pictures from before.

The Witness: It was Mr. Ray Smith, and then there was Mr. Ayres, as I recall, he was Branch Manager at Albany. That is why I say now Ray Smith was the Manager. When he told me it was Ray Smith, it was either Ray Smith or Ayres, was Branch Manager there at the time. There were two Branch Managers in that time. When I said it was Ray Smith, he was the Branch Manager at some time there. Mr. Ayres was there.

The Court: You don't recall whether it was Smith or Ayres?

The Witness: Yes, one or the other.

[fol. 3300] Mr. McClennen: The question now before the witness is what Mr. Ray Smith said and he raised the objection that he should not state that.

Mr. Wright: I withdraw the question.

Q. Just state what the Warner Branch Manager, whoever he was, said to you.

Mr. McClennen: That is objected to.

Mr. Wright:

Q. In the summer of 1936 or at the time this conversation occurred?

Mr. McClennen: This witness ought to remember the man that he talked with and state the man that this conversation took place with, not a characterized individual. I object to the question.

The Court: Overruled. He stated it was one of these two. In all these negotiations some confusion might arise in his mind. It was seven or eight years ago.

Mr. Wright: You can state what was said.

Mr. McClennen: This is, I understand, an unnamed person.

The Court: No, no, that is not an unnamed person. He said Mr. Smith or Mr. Ayres. He doesn't know which one it was.

Mr. McClennen: If your Honor please, we make a special objection to any conversation with Mr. Smith, because the [fol. 3301] record shows he was not the Branch Manager at this time.

The Court: We have to take that into consideration in connection with his answering using the word "Or."

Mr. McClennen: If he is going to answer something Mr. Smith said, we object to it on that ground.

The Witness: I wouldn't say definitely it was either one of the two.

The Court: Objection overruled. What did he say?

The Witness: He said to me as a friend of yours I will not reopen that theatre, but he says "If you insist, I might have a few rejected pictures for you."

Q. Is that all that was said?

A. That's all I recall.

Mr. McClennen: I move that the answer be stricken out on the ground that Mr. Smith was not the Branch Manager at that time and that the contents of the witness' statement further shows that it is not admissible in this case.

The Court: What do you say, Mr. Wright? Of course, the answer, the words in the answer itself, there is some confusion, we should know who it was.

Mr. Wright: I think it is reasonably clear, if the Court [fol. 3302] please, that he had this conversation with the man who was Branch Manager at the time for Warners at Albany on the grounds of identification. I think that is sufficient as far as the conversation itself being admissible, the nature of it was about the available pictures at Malone. I don't see that it differs in that respect.

The Court: The answer perhaps might be proper. Objection overruled. I will receive it.

By Mr. Wright:

Q. What other major exchanges did you visit there?
A. I went over to Fox.
Q. Who did you see there?
A. Mr. Grassgreen.
Q. What was that conversation, as nearly as you can recall?

Mr. McClennen: The same objection.
The Court: Objection overruled.
The Witness: Mr. Grassgreen says, "Very sorry, but we have one account in Malone, and we feel that we are getting pretty good revenue from that account and we are not interested in opening another account."
[fol. 3303] Q. Is that all that was said then?
A. He says "I might have a few pictures of Gaumont British."

The Court: What?
The Witness: Gaumont British pictures, "That we might let you have if you open the theatre."

By Mr. Wright:

Q. Was that all of that conversation?
A. That is all that was said.
Q. Did you see any other major exchange?
A. I saw the Branch Manager of Universal.

Q. Do you recall his name?

A. No, I can't say it for sure. There was a change there several times in a very short time between—I think it was Mr. Dina.

Q. Dana?

A. Yes, something like that. This is—I am not yet sure if Mr. Dina was the Branch Manager—I am just telling you——

The Court: That is your best recollection?

The Witness: Yes. They change managers very often in those exchanges, and I don't exactly recall if Mr. Dina was in there that time, or somebody else.

Q. You think the name might have been Dana instead of Dina?

A. No—I mean, it might have been another Branch Manager.

[fol. 3304] The Court: Is it spelled Da-n-e-r?

The Witness: No, I think D-i-a-n-n-a, is that right? I don't know.

By Mr. Wright:

Q. Was this a fellow you had dealt with before? Was it some one who was new there at the time?

A. No, he was there before, and he told me that——

Mr. McClennen: The same objection, if your Honor please.

The Court: Overruled.

The Witness: —they had pretty near half of the picture open.

The Court: He said what?

The Witness: Half of the picture available for me in Malone, and when I have my theatre all fixed up, we try to made a deal, "But we have several pictures of the year before, too, that never ran in town," and they will be first-run for me, that they could dispose of.

Q. Did you see anybody from Columbia at that time?

A. Yes.

Q. Whom did you see there?

A. At Columbia, I don't recall the name, your Honor.

Q. Do you remember whether it was a salesman or a Branch Manager?

[fol. 3305] A. No, I saw the Branch Manager.

The Court: What?

The Witness: I saw the Branch Manager.

Q. What was the conversation you had with him?

Mr. McClennen: Same objection.

The Court: Is there anything in the record here to indicate the name of the Branch Manager at that time?

Mr. Wright: I think it is Phil Fox was the Manager, according to our interrogatory.

The Witness: That is right.

The Court: Is that the man?

The Witness: That is right, Phil Fox.

Q. What was the conversation you had with Fox?

A. He said "There will be a lot of picture- for you available when time comes for you to open." He says, "We have sold Schine practically only 60 per cent of our product for the past two or three years, and we might have about twenty picture- available for you of this season, and about the same amount of the two seasons before.

Q. Then did you go back to see the exchanges again when you opened the theatre?

A. Yes, sir.

Q. When was it that you opened the theatre?

A. What is your question?

[fol. 3306] Q. What was the date when you opened the Plaza?

A. I think it was the second week of November.

Q. 1936?

A. Yes.

Q. Then with reference to that time when was it that you saw these exchange people again?

A. Oh, about a couple of weeks before I opened up.

Q. Whom did you see then?

A. I saw Mr. Halligan. That is the first one I see.

Q. Whereabouts?

A. Branch Manager in Albany—I mean Branch Manager of the R.K.O. in Albany.

Q. You saw him in Albany?

A. At Albany.

Q. What was said then?

A. Well, I said——

Mr. McClennen: Same objection.

The Court: Overruled.

The Witness: I said "I am ready to open up in a couple of weeks, and I would like to have some picture that you told me about, that you have open," and he answer, he says "I am sorry, but it is impossible *to* me to do any kind of business with you." He says "My hands are tied up. I can't do anything now."

[fol. 3307] Q. Is that all what was said?

A. Well, at the time that is all.

Q. Did you see the other exchange managers at the same time?

A. Yes, I did.

Q. Who else?

A. I see either—if it was Ayres or Mr. Smith, it is the Branch Manager of Albany, Warner Brothers.

Q. What did he tell you?

A. He said "It is impossible now to give you anything, unless a little later if we have any kind of rejection on picture, I might let you know.

Q. Whom else did you see?

A. I went to Paramount and I saw Mr. Eastman. He says "I am not going to be——"

Mr. McClennen: Same objection.

The Court: Overruled. Go on.

The Witness: Mr. Eastman told me, he says "I am not going to be the goat. After somebody sells you of the majors, I will do the same."

The Court: What is that?

The Witness: He said "I am not going to be the goat to be the first one to sell, but if any one of the major companies sells you any picture, then you come back and see me and I will sell you some pictures."

[fol. 3308] Q. Whom else did you see?

A. I saw Mr. Pielow.

Q. Who is he?

A. Branch Manager of the Metro-Goldwyn-Mayer.

Q. What did he tell you?

Mr. McClennen: Same objection.

The Witness: Mr. Pielow says "At the present time Schine is using pretty near everything we have, but there might be some rejection of a few picture- that we might dispose to you a little later on."

Q. By the way, had you seen Pielow on your prior trip to Albany when you saw the other exchange managers?

A. Yes, I did.

Q. What was the conversation you had with him then?

Mr. McClennen: Same objection.

The Court: Overruled.

The Witness: Mr. Pielow, the first trip, told me, he says "We pretty near sell all our product to Schine, except they have the right of rejecting a few picture- a year that might be available for you by the time you open up."

Q. Was there anything else said in this second conversation you just described?

A. In the second conversation, that at the present time [fol. 3309] there was nothing available, but a little later on "We might have something for you."

Q. Whom else did you see at the time of the second conversation?

A. At the second time, I recall, I went over to see the Branch Manager of Grand National Picture.

Q. Just confining yourself to the major companies that you had seen before. The second time you said you saw somebody at R.K.O., you saw somebody at Warner, you saw somebody at Paramount and somebody at Loew's. Did you see any one at Fox or Columbia or Universal on the second trip?

A. Not the second trip. That is all I have made. No, I didn't go back to see Fox at that time, because he wasn't—I went over, but he wasn't in the office.

Q. When you refer to "Fox," you are referring now to the Branch Manager at Columbia?

A. Yes.

Q. How about the Fox Company, Mr. Grassgreen, did you see him?

A. Mr. Grassgreen says to me again that it was impossible, that they had one account in Malone and they weren't going to take another one.

Q. Did you see the Universal people again?

A. I don't remember that I did on the next trip. I must [fol. 3310] have, but I couldn't say for sure. I don't recall now.

Q. Then, when you opened the Plaza Theatre, what policy did you operate it on in the fall of 1936?

A. My policy was 25 admission, double feature.

Q. What kind of pictures?

A. The picture?

Q. What pictures did you play?

A. I had Republic as one company, and I had Grand National of another company, and I have used a product that they made several years ahead, in order to operate the theatre.

Q. You mean several years back, don't you?

A. Back.

Q. Then you had no major pictures for your theatre——

A. No.

Q. —during the fall of 1936?

A. No.

Q. What policy was Schine operating the Malone on at the same time?

Mr. McClennen: For convenience when the Malone is used, we mean the same theatre that has been described as the Grand?

The Witness: Yes.

Mr. Wright: I take it the Grand and Malone are the same theatre.

The Court: The name was changed when they did the [fol. 3311] remodeling, is that it?

Q. When did the name change occur, do you recall?

A. I think the name changed right after—I don't remember exactly—1931 or 1932, the name was changed, the Malone Theatre, Malone Schine Theatre.

The Court: At the time, you said, they remodeled?

The Witness: Yes.

Mr. Wright: Would you read the last question?

(Question read.)

The Witness: If I remember, they were operating a policy of Sunday and Monday was their big attraction, as single program, and during the week they used to have a double feature of two changes.

The Court: Two changes?

The Witness: During the rest of the week, yes.

Q. There were three changes altogether?

A. One single feature.

Q. Two double features?

A. There never were any policies alike. Some week they used to have three changes, some weeks they used to have four changes, but it never ran the one solid base policy.

Q. What were the admission prices, as nearly as you recall?

A. If I recall, the admission price was 40 cents—I think it was 40 cents downstairs and 30 cents upstairs.

[fol. 3312] Q. How much of a balcony did they have in the theatre?

A. A little over 400.

Q. Then in 1937 did you get any major pictures?

A. In 1937, I think it is around February of 1937, I have had three or four pictures from Mr. Pielow of the Metro-Goldwyn-Mayer. That is, were rejected picture-, and after I went back to Paramount, and at the same time, about, and I had five or six picture- there, and three or four reissue.

The Court: Besides the five or six?

The Witness: Yes.

The Court: Paramount?

The Witness: Paramount. I am telling you this is about. It is nothing—it might be a picture less, it might be picture more. I don't recall exactly, but approximately that is pretty near what I had.

Q. This was about what time in 1937 that you were talking about?

A. About in February.

Q. Then was there any change in the policy at the Schine Malone Theatre at that time?

Mr. McClennen: This is February, 1937?

Mr. Wright: Yes.

The Witness: I don't recall any kind of a change at that [fol. 3313] time.

By Mr. Wright:

Q. When was the first time, then, that there was any change in the policy after the opening of your theatre?

Mr. McClennen: You mean in his policy?

Q. Change in the policy of the Malone Theatre after you opened your theatre?

A. I think it was exactly the time after I had the second-run product in the theatre.

The Court: When was that?

The Witness: That was, I think, around the summer of 1938, if I recall. Now, these dates, your Honor, and these times, as far as I am concerned, I give you just roughly about it. The date I am not sure of any of them.

The Court: You are giving your best recollection?

The Witness: Yes.

Q. We want to get your best recollection on all these dates.

A. Yes.

Q. You recall, according to your best recollection, then, you don't remember any particular changes in policy before —through 1937 until 1938, is that right?

A. Yes.

Q. What happened then?

[fol. 3314] A. Well, the change was that Schine put on some money night.

Q. Do you remember about when that began?

A. I don't recall exactly, but it is in the summer of 1938, maybe before. My memory is kind of lost now on this.

Mr. Wright: I will ask to have these marked the next Plaintiff's exhibit numbers for identification.

(Thereupon two newspaper clippings, referred to, were marked as Plaintiff's Exhibits 855 and 856, respectively, for identification.)

Q. I will show you these clippings marked Plaintiff's Exhibits 855 and 856 for identification, and ask you if you recognize those as ads for the Malone Theatre clipped from the Malone Evening Telegram for Tuesday, May 2nd, 1939, and Tuesday, May 9th, 1939, respectively?

A. Yes, sir, these were when the competition was in full swing.

Mr. McClennen: Just a moment. The question has been answered, and I submit the rest should go out.

The Court: Yes, he said these were.

Q. Do you recall how long prior to May, 1939, the money nights that are advertised there had been in effect?

A. Will you say that again?

[fol. 3315] Mr. Wright: Would you read it?

(Question read.)

The Witness: Oh, certainly before this—about a year before this.

The Court: About a year before?

The Witness: Yes, sir, your Honor.

The Court: Before that date, you mean?

The Witness: Pardon?

Q. A year before May, 1939?

A. Just about. I couldn't tell you for exact, but quite long before this.

Q. Then, was it about the same time that the money nights started that there was a change in the admission prices at the Malone?

Mr. McClennen: Objected to as leading.

The Court: It is leading. Let him state what the facts are.

Q. What, if anything, was done regarding the admission prices at the Malone Theatre?

The Witness: At the Malone? What I have done myself?

Q. No, what if any change was there in the admission prices at the Malone Theatre at or about the time the money nights started?

Mr. McClennen: That is objected to as leading.

The Court: Counsel objects to it as leading. The implication is that some change was made. What, if anything, [fol. 3316] was done with reference to the prices in May, 1938 or 1939—did you say 1939?

Mr. Wright: I was just trying to narrow the time field somewhat. I will let him take them all, then.

Q. Answer the Court's question, as to what, if any, changes in admission prices there were at the Malone Theatre while you were operating the Plaza?

A. I couldn't understand that question.

Q. Were there any changes in the admission prices that the Malone Theatre charged while you were operating the Plaza Theatre?

A. Yes, there was.

Q. When did the first change occur?

A. I couldn't give you the exact date, but at the time I started to have second-run pictures at my house the price was reduced.

Q. And that was about when, as nearly as you can recall?

A. Oh, about I think I had second-run product about in June, 1938, something around there, the summer of 1938.

Q. The summer of 1938?

A. Yes, I don't recall the exact date.

Q. When was it that you first attempted to get or first had any conversations with the exchange managers about [fol. 3317] getting major product second-run for your Plaza Theatre?

A. After I was exhausted of all——

Mr. McClennen: May this be stricken out, if your Honor please?

The Court: State when it was.

The Witness: After I was exhausted——

Mr. McClennen: This is stricken out.

The Witness: It is stricken out?

By Mr. Wright:

Q. Try and give the time as nearly as you can without reference to whether or not you had exhausted your supply of independent pictures.

A. Well, about, I say six months after I opened up.

Q. Six months after you opened up that would be the spring of 1937?

A. Spring of '37.

Q. Whom did you see about second-run product?

A. In the spring of 1937 I made a trip to Albany and I contacted all major companies except United Artists that did not have a branch in Albany.

Q. Well, whom did you see there?

A. I saw first Mr. Pielow.

Q. What did he tell you?

A. I said, "Mr. Pielow, I am ready to do business with you, if you want to sell me second-run."

[fol. 3318] Mr. McClennen: Same objection.

The Court: Overruled.

The Witness: He said "I will take that into consideration with the New York office, and I will let you know a little later."

Q. Did you hear from him a little later?

A. No. I went over—next I saw Mr. Eastman. I asked him for second-run product, and the answer was that——

Mr. McClennen: Same objection.

The Court: Overruled.

The Witness: "After you secure any from any other major companies, second-run, I will be in the market to sell you second-run myself." Then I went over and saw Mr. Grassgreen at Fox, and I told him I was in the market——

Mr. McClennen: Same objection.

The Court: Same ruling.

The Witness (Continuing): —to buy second-run product, and his answer was "We have enough revenue coming out of our first-run product in Malone, and we are not interested to sell second-run in the Town of Malone." Then I went over to Columbia and at that time I told them I was in the market——

Mr. McClennen: Just a moment.

[fol. 3319] The Court: Whom did you tell?

Q. Whom did you talk to?

A. I talked with I think it was Mr. Fox, Phil Fox, if I recall. Phil Fox, the Branch Manager.

Q. What did he tell you?

Mr. McClennen: Same objection.

The Court: Overruled.

The Witness: Mr. Phil Fox said that at the present time he couldn't give me anything definite, and he will let me know a little later.

Q. Did you hear from him?

A. No.

Q. Did you see anybody else?

A. I saw Halligan, R. K. O.

Q. What did he tell you?

Mr. McClennen: Same objection.

The Court: Same ruling.

The Witness: "I am sorry, but I can't talk any business at the present time for second-run."

Q. Is that all that was said?

A. That I remember.

Q. Did you see anybody else?

The Court: Who?

The Witness: That was Mr. Halligan.

The Court: All right, go ahead. What did he say?

[fol. 3320] The Witness: You have what I said?

The Court: Whom did you see after Halligan?

The Witness: After Halligan I saw either Mr. Ayres or Mr. Smith at Warner Brothers. I told them that I was ready to buy second-run to run my theatre, and "I am ready to make a deal. right away", and he says "We couldn't do it now. We have submitted it to New York."

Mr. McClennen: Same objection.

The Court: Overruled.

The Witness (Continuing): And no answer from him.

Q. Did you see any one else?

A. Not that I recall.

The Court: Did he say anything about—you said it would have to be submitted. Did he say he would submit it?

The Witness: It would be submitted.

Q. What was he going to submit? Was there any talk about terms or anything?

A. Mr. Smith, if the Company wants to sell me the pictures or not.

Q. Second-run?

A. Yes.

Q. I will show you this copy of a letter dated May 21st, 1937 from Mr. Grassgreen to you, which has been previously [fol. 3321] identified as Exhibit 195 for identification, and ask if you recognize that as a copy of a- original received by you at or about that time?

A. Yes, sir, this is the exact letter that I received.

Mr. Wright: I will offer his Exhibit 195 in evidence.

(Thereupon letter previously marked as Plaintiff's Exhibit No. 195 for identification was received in evidence.)

Mr. Wright: The letter dated May 21st, 1937, addressed to Mr. Boumansour at the Plaza Theatre, Malone, New York, states:

"Following up your recent letter, I regret to inform you that we will not be interested in serving second-run in the City of Malone, first, because of the size of the town and secondly, because of the possibility of dissipating our first-run revenue. We have a franchise in the City of Malone, which runs for a number of years, and with the maximum number of pictures playing on percentage, we do not believe it is good business to play them at a later date second-run, for there is no question but what it will cut in on our

first-run revenue. In the meantime with kindest regards. [fol. 3322] Yours very truly."

Q. This letter, Exhibit 195, was that received by you before or after this trip to Albany where you had the conversation with Mr. Grassgreen about second-run?

A. Just about the week after I came back.

Q. Then you say you finally did start to play pictures second-run there in the summer of 1937, is that right?

A. About—would you repeat that?

(Last question read.)

A. The exact date I couldn't tell you for sure.

Q. When were you first told by any of these exchanges that you could have some second-run pictures?

A. Well, I wrote to the Department of Justice.

Mr. McClennen: May that be stricken out, if your Honor please?

The Court: He asked you about the time.

The Witness: The time. It is after June. It must have been, yes, in the summer, late in the summer of '37.

Q. When did you write to the Department of Justice?

Mr. McClennen: That is objected to. It does not appear he has written to the Department of Justice.

The Court: That is very true.

[fol. 3323] Q. Did you write to the Department of Justice?

A. Yes, I did.

Mr. McClennen: That is objected to.

The Court: Let the fact stand. What was done is not competent. Overruled.

Q. And when was that, approximately?

Mr. McClennen: That is objected to, the letter would show.

The Court: Let him state about when.

The Witness: Early in June. I don't recall exactly, but I know it is in the summer, early.

Q. Did I ask you—I asked you for the date as nearly as you could fix it. It is the actual date when you were notified by any of the major companies that you could have second-run.

Mr. McClennen: Just a moment. It is obvious that my brother must have the letter, and I am wondering if he is going to leave this answer of the witness uncorrected as to the time.

The Court: That is true.

Mr. Wright: I would be very glad to have the letter identified, too. I assumed it would be objected to if I attempted to offer the letter itself.

Mr. McClennen: The graver objection is to letting stand [fol. 3324] this witness' testimony as to the time.

The Court: That is true. Yes, I think the answer as to the time should be stricken out. With reference to a letter to refresh his recollection as to time if it does, if he can state without such reference, but it will be stricken out as it now stands that he wrote to the Department on this specific date.

Mr. Wright: I will ask to have this marked with the next exhibit number for identification.

(Thereupon the original letter, dated June 30, 1937, referred to, was marked as Plaintiff's Exhibit No. 857 for identification).

Q. I will show you this letter dated June 30th, 1937, marked Exhibit 857 for identification, and ask you if that is a copy of the letter to the Department of Justice that you just referred to in your testimony?

The Court: Is that the copy?

The Witness: That is the copy of that.

By Mr. Wright:

Q. That is the original letter, is it not? That is the original letter you wrote? That is your signature on there?

A. It is not my signature.

[fol. 3325] Q. Well, is it the letter you wrote and sent?

A. Yes, but it isn't my signature there.

The Court: Was it signed at your request by somebody for you?

The Witness: Yes, but isn't my signature, but it is the letter.

Mr. Wright: It is the letter you wrote?

The Witness: It is the letter I wrote to the Department of Justice.

Q. And it is the one you are just referring to?
A. Yes, I think my assistant must have signed it.
Q. There is no letter you wrote prior to this?
A. No.
Q. This exhibit 857 was the one you first wrote and it was written on or about the date that appears there?
A. Yes, 1937.
Q. June 30th, 1937, is that right?
A. Yes, it must be.
Q. Does that letter refresh your recollection as to when it was that you were offered a second-run deal?

The Court: That calls for a conclusion.
Mr. Wright: Well, as to when you actually——
The Witness: If I recall that after the letter was sent I was approached by a telephone call.
Q. Who called you?
[fol. 3326] A. From Warner Brothers of Albany.
Q. Who was it, do you know?
A. Albany.
Q. Do you know who the individual was who called you?
A. Mr. Ayres of Albany called me up on the telephone and stated——

Mr. McClennen: Just a moment. That's all you were asked.

Q. Tell us what the conversation was you had with him.

Mr. McClennen: Same objection.
The Court: You knew Mr. Ayres' voice, did you? You knew who it was talking?
The Witness: Yes.
The Court: Overruled. What did he say?
The Witness: He said he had a contract ready for me in his office in Albany.
The Court: A what?
The Witness: A contract in his office ready for me.
Q. What did you do then?
A. So I took the first train to Albany, and I went into his office and he had a contract already written, ready to sign, so I looked at the contract and I said to Mr. Ayres, "I like the contract, but I don't like the prices", because the prices were really pretty near on the feature part.

Mr. McClennen: That is objected to.
[fol. 3327] The Court: Tell what they were.

Q. Just say what you said. Limit yourself to what you said to him and what he said to you.

A. I am telling you exactly what the conversation was. That is what you want to know?

Q. Yes.

A. I told him the prices were pretty near double what they should be. Well, he said, "I have nothing to say. Either take it or leave it. You have the preference of taking it or leaving it". I said "Give me your pen", so I took the pen. I said "I am going to give Warner Brothers a present of five hundred or six hundred dollars on this contract, but I would rather do that than close my theatre."

Q. Was it before or after that you got any second-run pictures from any major company?

A. After that.

Q. How long afterward?

A. Oh, gosh, on the same trip I went over and showed the contract to the major companies and get that so the contract of Warner Brothers they did some business with me.

Q. And you bought second-run from the other company?

A. Yes, I bought a few second-run at that time from another company.

[fol. 3328] The Court: Warner and who else?

The Witness: I recall at that time the next deal that I made was with Paramount. Then the third deal was with Metro-Goldwyn-Mayer.

The Court: At the same time, you mean?

The Witness: About. I can't recall, your Honor, for sure now, because it has been so long.

By Mr. Wright:

Q. Then, after you began to play these second-run pictures was there any change in the admission price of your theatre?

A. Yes, sir, that is where the cut in the prices started, right after I started to play second-run picture, the prices were cut slightly. Not very much at that time.

The Court: You mean cut by whom?

The Witness: At the Schine.

Q. What prices are you talking about?

A. I think the admission was cut from 40 to 30 and from——

Q. You are talking about the admission where?
A. At the Schine Theatre.
Q. The evening adults?
A. Evening adults.
Q. From 40 to 30?
A. From 40 to 30, and from 30 to 20 in the balcony at that time, that I recall.

[fol. 3329] Q. What were you charging then when you first started to play the second-run pictures?
A. 25 cents admission.
Q. Then after Schine went to 30 and 20, what, if any, changes did you make in your house?
A. I did not make any change at all.
Q. For how long?
A. Oh, I don't recall. The only change that I made in my house, when Schine started these money-give-aways at night, then, to compete on the money-give-away, I used to charge during the rush hour, during 6:30 to 7 o'clock at night, 15 cents.
Q. When was it those money-give-aways began?
A. Began, I can't tell exactly when, but just about a few months after I started to run second-run pictures.

The Court: We will have to suspend at this time. I have an appointment.

(Whereupon a recess was taken until 2 o'clock P. M.)

[fol. 3330] After recess, 2 o'clock P. M.
Appearances: As before noted.

Mr. Kallis: I have two witnesses here, newspaper publishers. Their testimony will be very brief, and if your Honor has no objection, we would like to put them on.
The Court: I have no objection.

Read Clarke, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kallis:
Q. Mr. Clarke, where do you live?
A. Perry, New York.

Q. What is your business?
A. Newspaper publishing.
Q. Are you connected with any newspaper?
A. Perry Record.
Q. Where is that published?
A. Perry, New York.
Q. How long have you been connected with the Perry Record?
[fol. 3331] A. About 30 years.
Q. Are you acquainted with Mr. John A. May, one of the defendants in this suit?
A. I have met him.
Q. Calling your attention to 1935, did you have occasion to meet Mr. May?
A. I did.
Q. When and where?
A. It was during the summer of 1935, as I remember it, various places in Perry,
Q. Will you please state—did you have a conversation with him?
A. Yes.
Q. Will you please state the substance of the first conversation you had with him?

Mr. McClennen: Just a moment. This we interpose an objection to. Of course, I cannot tell until I hear the conversation, whether it is right or not, but I object to the question on the ground of its materiality.

The Court: Overruled.

Q. Please state the conversation.
A. I had heard about the plans for building a new theatre in Perry, and I inquired of him what they were, the details, from a news angle.
[fol. 3332] Q. What did he say?
A. He said they planned to build a theatre.
Q. Did he mention the name of the enterprise that was planning to build the theatre, the name of the company?
A. He was an official of the Schine organization.
Q. And he said that the Schines were planning on building a theatre?
A. He did.
Q. What, if anything else, did he say concerning the project?
A. Nothing in particular, as I remember.

Q. Did you see him again?

A. I saw him probably two, three or four times during the summer.

Q. Where, in what city?

A. In Perry.

Q. Perry, New York. What did he say the second time you saw him?

Mr. McClennen: What is the date of this, this second time?

Q. As nearly as you can recall, Mr. Clarke, please give us the date of that second conversation?

A. It was all along near together, within a reasonable short time. I don't remember the exact dates or months. It was during this one summer.

Q. Well, I show you plaintiff's Exhibit 807, 808 and 809 [fol. 3333] for identification——

The Court: That is 807 or 808?

Mr. Kallis: 807, 808 and 809, all for identification.

Q. I call your attention to the articles that are circled in red on the first page of each of those exhibits, and ask you to look at them, please.

(Witness examines documents.)

Q. Do you know who was the author of the articles in those three exhibits?

A. I wrote them.

Q. Will you look at them, Mr. Clarke, and see whether they refresh your recollection as to when you had those conversations with Mr. John A. May?

A. Well, they would be right adjacent to this publication time, probably.

Q. With respect to July 11th, 1935, which is the date of Exhibit 807 for identification, when would you say that your conversation with Mr. May occurred?

A. Well, I would assume the week of July 11th.

Q. Calling your attention to August 1st, 1935, which is the date of Plaintiff's Exhibit 808, for identification, did you have a conversation with Mr. May on or about the date of August 1st, 1938?

A. Yes, I did.

Q. Will you please state the substance——

[fol. 3334] The Court: 1938? The first conversation was 1935.

Mr. Kallis: I meant 1935. I am sorry, your Honor. August 1st, 1935. I mis-stated that.

Q. What was the substance of this conversation with Mr. May on or about August 1st, 1935?

A. As I recall it, in connection with this story, I remember the conversation in which he said that they would employ as much Perry labor as possible. In the latter part of the story it says "Perry contractors", and so forth, "Were given an opportunity to quote"——

Mr. McClennen: Not reading it.

The Court: Yes. It is only for identification.

Q. Did he say anything about the size of the theatre that was contemplated?

A. Yes, he said it would seat about a thousand people, as I remember it.

Q. And was there any statement made by him as to the contemplated cost of the theatre?

A. Around $100,000.

Q. Did you have any other conversations with Mr. May, either in July, August, September or October, 1935, other than the two you have just mentioned?

A. I couldn't say as to that.

Mr. Kallis: I offer, if the Court please, Plaintiff's Ex-

[fol. 3335] hibits 807 for identification and 808 and 809.

By Mr. Clennen: I object to them at this time.

The Court: Sustained. They are hearsay.

Mr. Kallis: If the Court please, I understood him to say he talked with John A. May, one of the defendants.

The Court: Sure.

Mr. Kallis: And the information, the substance of his conversation with Mr. May is published in these newspapers.

The Court: Yes, I know, but what he published certainly is hearsay. He has told what he talked about with Mr. May, and this paper refreshes his recollection, and that is all there is to it.

Mr. Wright: If the Court please, I think it goes a little further than that. There is already in evidence the contents of the newspaper were communicated to——

The Court: Mr. May.

Mr. Wright. Mr. Herzberger testified on the stand that he read these articles as they appeared. Now, we have shown that the articles were the results of visits or conversations of Mr. May with the witness, and I think it [fol. 3336] makes the articles competent to show what occurred. Mr. May was not talking to this witness then for any other purpose than to have the information published in the paper. Certainly Schine is responsible for whatever is published in the paper, as a result of their going to the editor and supplying him with this information.

The Court: Mr. Herzberger testified he saw this article in the paper. That is very true.

Mr. Wright: We have shown, if the Court please, the whole purpose of having the conversation with the editor, of Mr. May going to the editor is, of course, to give publicity to the fact.

The Court: He went to the editor. The editor went to him.

Mr. Wright: In either event, whether he went to the editor or whether the editor went to him, Schine is certainly responsible for the publication of material that they gave to the editor of the paper, whether it is in the form of an ad or anything else.

The Court: It doesn't make it any stronger if he testified what Mr. May told him. Mr. Herzberger testified that he [fol. 3337] read the substance of what Mr. Clarke told him.

Mr. Wright: The paper is still not in evidence. We are now offering the paper in evidence to show what was communicated in this manner to Mr. Herzberger, and we have shown that what was communicated was communicated to him as a result of a conversation between Mr. May and the editor of the paper. If the Court please, we are entitled to show what that communication was by having the newspaper itself in evidence, just as much as though——

The Court: What is your answer to that, Mr. McClennen?

Mr. McClennen: The vice in the argument is that it is asserted that this rendered the Schines responsible for what the editor said in the paper. The witness has testified to what was said and that is all that we are responsible for. We are not responsible for anything beyond that that the editor may have chosen to say in the paper, and this is wholly apart from anything connected with us. What is

connected with us has been told by the witness, and that is all that is material in this case.

[fol. 3338] Mr. Wright: On the basis of Mr. McClennen's own statement it is clearly competent to show that the information supplied by Mr. May, which appeared in the article was communicated by means of the article to Mr. Herzberger, and for that purpose we offer it in evidence.

The Court: Let me see the document there. I assume from the length of it, it seems much longer than the statement made by the witness.

(Mr. Wright hands the paper to the Court.)

The Court: Well, of course, these documents in the first place all include more than he says here. Objection sustained.

Mr. Kallis: Maybe I can clarify that by one question.

By Mr. Kallis:

Q. Mr. Clarke, can you state whether all of the statements in these three exhibits, 807, 808 and 809 for identification were furnished—strike that. Whether the information contained in these three exhibits was furnished to you by Mr. May when you had these talks with him?

Mr. McClennen: That is objected to as——

The Court: Sustained.

Mr. Wright: If the Court please, we have in the complaint the allegation that as a means of intimidating theatre [fol. 3339] owners to making sales of their property Schine did take options and cause information to be circulated about the taking of options and proposed construction of theatres, as a means of inducing sales.

Now, clearly, we are entitled to show, I take it, that they did that, and when we show that they go into the town and take an option that they communicate the fact with respect to the proposed activity to the newspaper in the town, that the newspaper then publishes the fact and that those facts are brought to the attention of the theatre operator in the town, or any one else who is interested in operating the theatre, that we have then established a perfectly competent chain of proof to establish those allegations of the complaint. That is what we have done here.

Now, in so far as the newspaper containing other material, or in so far as the article may contain additional com-

ments of the editor, all of that material may, of course, be disregarded as far as we are concerned. We are not interested in it, but we still are interested in showing, and [fol. 3340] our proof has shown that certain facts about the proposed project were published in the paper, and that is the purpose of this proof. I don't understand on what theory those facts may be excluded.

[fol. 3341] The Court: In the first place, the articles contain—vaguely contain matters to which no reference has been made in the testimony of this witness. In the second place, he has testified that statements made by May, which he published in the paper, and which Mr. Herzberger testified he read, that is all there is to it. You have got the proof all there.

Mr. Wright: If that is conceded, then I say there is no purpose in having the article, but I assume the only way you can tell which are the statements which Mr. May had communicated to the editor of the paper or brought to Mr. Herzberger's attention, is by looking at the article itself. That is the only purpose.

The Court: There is no reference in any one of the three articles to Mr. May.

Mr. Wright: That is quite right, but the articles do contain, as I understand it, facts which were given by Mr. May and to the extent to which they contain it——

The Court: Is it your idea that you can accept one statement in these published articles and eliminate the balance, [fol. 3342] when they are all offered?

Mr. Wright: I assume there is no way I know of physically cutting up the article, but I assume under your Honor's ruling, you would not attribute to the defendants anything that appears in the article other than such information as appears from the witness was furnished to the witness by Mr. May, but they are competent, it seems to me, for the purpose of showing publication of any information, and that is all they are offered for.

Mr. Kallis: In other words, we only offer that part of the newspaper items which are the results of Mr. May's information to the editor of this newspaper.

The Court: It would be entirely hearsay, that is the point about it. As I pointed out once before, Mr. Clarke has testified to the conversation with the public stenographer at the time these conversations were had. The other wit-

ness, Mr. Herzberger, testified that he read articles in the Record, and he told what he read, and that is all there is to it.

Mr. Wright: Without knowing what is in any article——

The Court: He has told what is in the articles. Mr. [fol. 3343] Herzberger has told what was in the articles.

Mr. Wright: I did not so understand the record, I didn't think he was permitted to state what he had seen other than the fact he saw the articles indicated here outlined in red pencil on the paper.

The Court: He went farther than that, because he told about obtaining all the information from articles in the paper and that information was the statement he made; that seems to me that accomplishes your point, and there is nothing added by the introduction of that part of the publication of the papers to which you refer.

Mr. Wright: Let us get Mr. Herzberger's testimony, and we will get that. As I understand it, all he was permitted to testify to was that he had seen these articles, without disclosing what the contents of them were.

The Court: What articles?

Mr. Wright: The articles referred to here, the newspaper articles that have been identified. He identified those as having appeared in the paper of that date and he saw them [fol. 3344] and he read them, but as to what they were, the only way I know of, to make that apparent, is to offer the article itself.

The Court: I will refer to the testimony.

Mr. McClennen: Mr. Herzberger's testimony was that he read at the time the article in Exhibit 808 for identification, and I can't say from my brief notes whether he also said he read the others or not.

The Court: I do not think any distinction was made between them.

Mr. Wright: That is my recollection of the testimony.

The Court: The testimony is on my desk, right inside the door.

Mr. Wright: It is just a question of getting the volume of the transcript up here.

The Court: What page is the written testimony on?

Mr. McClennen: 2576 and 2577.

Mr. Wright: That is the volume, I presume, they are bringing up.

(Volume of testimony produced into Court.)

Mr. Wright: Does your Honor want to read it?

The Court: Yes. (Volume of testimony handed to the Court.)

Mr. Wright: That is 2573, at the end.

(Testimony referred to examined by the Court.)

[fol. 3345] The Court: What part of this are you offering, Mr. Wright?

Mr. Wright: Well, we are offering——

The Court: You spoke of separating some part of it.

Mr. Wright: I do not think——

The Court: There are many statements there of things which are not included in the statement made by Mr. Clarke as to his conversation with Mr. May.

Mr. Wright: Well, I think it may be understood that as to any information which may appear in the article which was not furnished to him by Mr. May, it may be disregarded, and we can cover it that way.

The Court: You agree with me that there is a good deal in there.

Mr. Wright: Well, I don't know just what your Honor refers to. He refers to the option, and the theatre site and construction on the property.

The Court: We have heard nothing about the Davis garage property. We have heard nothing that the garage property which was recently taken by the Schine company was taken up on Tuesday for the purpose of the theatre. There has been no testimony about that at all.

[fol. 3346] Mr. Wright: The only way I know to separate it out is to take the witness down the article item by item and see which he got from Mr. May.

The Court: The articles are largely filled with matters to which the attention of the witness has not been called. I think in view of the testimony of Mr. Herzberger that part of the paper is competent in view of that testimony.

By Mr. Kallis:

Q. Mr. Clarke, I ask you to look at Plaintiff's Exhibit 807 for identification, to the part that is circled in red, and please tell us, starting at the beginning and going through there, sentence by sentence, tell us which parts of

that article which you say you wrote were based on information furnished to you by Mr. May?

Mr. McClennen: That is objected to, if your Honor please.

The Court: Sustained.

Q. Well, will you look at that item again, Mr. Clarke, read it over, will you please, to refresh your recollection? (Witness examines article.)

A. All right.

Q. Will you please state as fully as you can everything that Mr. May said to you on or about July 11th, 1935?

Mr. McClennen: There is no reason why the witness should not have the paper right before him.

[fol. 3347] The Court: No, it is not necessary to read from it. Let him state the substance.

Q. You can use that to refresh your recollection, if you want to.

A. Mr. May, in the beginning, was my source of authentic information regarding the plans of the Schine organization. Just what he said or what times he said it, I don't recall back that far, but I do know that he gave me the primary facts in connection with this enterprise, such as definite plans to build, cost of the theatre, seating capacity, and so on. When those conversations took place, or what was said at different times, I don't recall.

The Court: Let me ask one question of counsel here. Reference is made in this to the interrogatories here, listing certain real property; does that list include the so-called Davis property?

Mr. Wright: I thought we read into evidence the answer relating to that acquisition.

The Court: It is interrogatory 31.

Mr. Wright: It is my recollection that we read the following data: "Location, Main Street, Perry, New York," Under the heading of "Location" there is "Main Street"; [fol. 3348] "Nature of interest, fee,"—"Date of acquisition, July, 1935." Under the heading "From whom acquired", "Davis." Under the heading of "Nature of Improvement now existing, vacant land."

The Court: It says "From whom acquired, Davis"?

Mr. Wright: Yes.

The Court: That is what I asked you about, the Davis property.

Mr. Wright: Yes, sir, under the heading "From whom acquired" appears the word "Davis." I think there was also reference to it as the Davis property by the witness.

The Court: Well, the testimony of Mr. Herzberger was: "Q. After Mr. May's conversation with you did you see any announcement in the paper with reference to that Davis property?

A. I did.

Mr. McClennen: That is objected to. That would call for the contents.

The Court: Sustained.

Mr. Wright: It did not call for the contents. I asked if he saw it.

The Court: Yes, it does. It calls for some announcement with reference to the theatre property.

[fol. 3349] Mr. Wright: Mark these as the next exhibits for Identification.

"(Four newspapers, "Perry Record" were marked as Plaintiff's Exhibits 807, 808, 809 and 810 for identification")

By Mr. Wright:

Q. Now, Mr. Herzberger, do you recognize this document that has been marked for identification as Plaintiff's Exhibit 807 as a copy of the Perry Record for Thursday, July 11, 1935?

A. I do.

Q. Did you read it when it came out?

A. Yes.

Q. Did you note at that time the item on the first page there that is outlined in red pencil and headed "Exercise Option of Theatre Site"?

Mr. McClennen: That is objected to.

The Court: Sustained.

Mr. McClennen: Why can we not have——

The Court: Sustained. All I think you can do at this time is to fix some date, as of that date, but the contents of the paper, of course, would be hearsay.

Mr. Wright: I think we are entitled to show what knowledge this witness had, whether by hearsay or otherwise. [fol. 3350] We went into extensive cross-examination of Mr. Essick, in which he was asked what rumors, what he had

heard about Schine coming into the town. I submit this witness can always testify as to what he saw in the paper.

The Court: If it was received without objection, as these questions were, that is one situation. On cross-examination, that is another situation. There is no basis for this.

Mr. McClennen: The question was, stating the contents of the paper.

The Court: I will let you show that he read that on the date it bears, such-and-such a date.

Mr. McClennen: That is not the objection that we make.

The Court: I know that.

Mr. McClennen: I am charging that Counsel for the plaintiff attempts to get in the contents of papers not yet admitted in evidence, and that is the ground of my objection.

The Court: Well, I think I am going to receive it in view of Mr. Herzberger's testimony. I did not have that in mind when I sustained the objection in the first place, the testimony of Mr. Herzberger was not in mind at all.

[fol. 3351] Mr. McClennen: I call your Honor's attention, that the witness was asked if he read this outlined—what was outlined in red in this newspaper.

The Court: Yes.

Mr. McClennen: As if that was the thing that was offered of importance in this case.

The Court: Yes.

Mr. McClennen: And outlined in red are these words: "Madam Ethel Snider of Cleveland, Ohio, nationally known astrologist and physiologist is spending the week in Perry. Madam Snider, a graduate of several universities——"

Mr. Wright: If the Court please, there is obviously a mistake. The red line at the bottom should have cut before "astrologist."

Mr. McClennen: There was an obvious mistake in what is offered then and what I was objecting to.

Mr. Wright: Clearly your red outline included an item which hasn't any relation to the case. It certainly isn't an item which could do the defendants any harm.

The Court: The red line also includes reference to the theatre. The objection is overruled. I will receive it under the construction stated by Counsel. The reception [fol. 3352] will be confined to that portion to which the witness has testified.

[fol. 3353] Mr. McClennen: Could we have outlined in an unmistakable way what is admitted?

The Court: I don't know that we should spend any time on that.

Mr. Wright: I think that is the only error in outlining.

Mr. McClennen: I had not seen the articles when I made the objection and Mr. Wright told how we went into town and got options, and I find that the article is that we went into town and bought the property, and that is the statement in the article. It is a very different one than outlined in the articles.

The Court: You were not finding fault that there is disagreement. Your criticism——

Mr. McClennen: My criticism is that I was relying on the argument made as to the contents of the papers, not on what was in the paper. I haven't had any reason to question it.

The Court: With reference to a lease and now the reference is to a purchase, and the point you make is there is a difference between a lease and a purchase.

Mr. McClennen: No, the argument presented for the plaintiff was that we went into town and got an option. [fol. 3354] The thing that is really offered to which we have no objection is the fact that we had made a purchase at this time.

The Court: An option rather than a lease. What I meant by my statement, I used the word "lease" rather than "option", but my inquiry was you do not criticize from your standpoint the fact there is testimony with reference to an option, and there is also testimony with reference to purchase of the property.

Mr. McClennen: There is no testimony with reference to an option, if the Court please; there is testimony as to a purchase and the witness' testimony was, so far as it showed a purchase by us of land, and there wasn't anything that we are in this court with in any way.

The Court: What is the testimony as to an option, then?

Mr. McClennen: There wasn't any.

The Court: Who was testifying to an option?

Mr. McClennen: Mr. Wright.

The Court: He hasn't testified at all.

Mr. McClennen: In arguing a paper was handed to your Honor, which I have not seen, and he told that, and I was

basing my objection on that fact assuming that it was a correct statement of the contents of the paper.

[fol. 3355] The Court: It wasn't meant there was testimony of an option. Now, the testimony shows it is a purchase. All right. Is that all of this witness? Cross-examine.

Mr. McClennen: I have no questions.

Mr. Kallis: That is all, Mr. Clarke.

If the Court please, Mr. Clarke was kind enough——

The Court: They are not marked.

Mr. Kallis: Yes, they are marked. I was going to say Mr. Clarke was kind enough to let us take these out of his files. I would like leave to substitute photostatic copies.

Mr. McClennen: I still object on the photostatic copies as well. There is included this lining of something that has nothing whatever to do, and so there be no misunderstanding we understand nothing else in the paper is received in evidence, except the date of the paper and the article that refers to this acquisition and plan.

Mr. Wright: That is understood.

The Court: As far as we can go the testimony given by Mr. Clarke.

[fol. 3356] (Thereupon the three newspaper articles previously marked as Plaintiff's Exhibits Nos. 807, 808 and 809, were received in evidence.)

Matthew Weber, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kallis:

Q. Mr. Weber, where do you live?

A. Salamanca, New York.

Q. What is your occupation?

A. Newspaper publisher.

Q. What, if any, newspapers are you connected with?

A. The Salamanca Republican Press, Daily, and the Cattaraugus County Republican, Weekly.

Q. How long have you been connected with the Salamanca Republican Press?

A. Since we established it in 1904.

Q. I show you what has been marked as Plaintiff's Exhibit 854 for identification, and I direct your attention to the article in the column of the extreme right on the first [fol. 3357] page of that exhibit. Have you seen that article before?

A. I have.

Q. Will you please tell the Court who is the author of that article?

A. I wrote it.

Q. Were you acquainted with Mr. C. R. Dickerson on December 24, 1938?

A. I was.

Q. Did you have occasion to talk with Mr. Dickerson on that day?

A. My recollection is Mr. Dickerson came to my office.

Q. Can you tell the Court what Mr. Dickerson's position at that time was?

A. He was the Manager of the Schine Theatre in Salamanca.

Q. You say he came to your office?

A. That is my best recollection.

Q. Will you please tell the Court what conversation took place?

Mr. McClennen: That I object to.

The Court: Objection overruled.

Q. Had you had prior business dealings? Will you please state the substance of the conversation?

A. I may look at this to refresh my memory?

Q. Yes, you may.

A. Mr. Dickerson told me in substance that the Schine [fol. 3358] Company would build a new theatre on a lot which they previously had purchased on Main Street in Salamanca near the corner of Clinton Street. He told me that Mr. C. C. Young, the District Manager and John Eberson, an architect for the Schine Company had been in Salamanca the day before to inspect the property, that is, this lot, and that plans for a new theatre would be submitted shortly after January 1st, and bids sought immediately; that the plans called for completion of the theatre by the first of May.

The Court: What year was that, Mr. Weber?

The Witness: That was 1938. The Schine Company at that time was operating a theatre in Salamanca, known as the Andrews Theatre, and Mr. Dickerson said that the company planned to continue to operate the Andrews.

Q. Did Mr. Dickerson say what the contemplated theatre—or when it was expected to be built?

The Court: May, 1938?

The Witness: Plans called for the completion of the building by May 1st.

Q. What year?

A. 1938.

Q. This conversation you had with him was on December——

A. Yes, it would be May, 1939, the following May.

[fol. 3359] Q. The conversation you had with him was on December 24th, 1938?

A. Yes.

Mr. Kallis: Now, if the Court please, I offer Plaintiff's Exhibit 854 for identification in accordance with your Honor's previous ruling.

Mr. McClennen: If I might see it?

The Court: Who was the witness who testified?

Mr. Kallis: Just before him?

The Court: On the Salamanca situation?

Mr. Kallis: Irving Cohen.

The Court: What do your interrogatories show in regard to the property after that time?

Mr. Wright: Interrogatory No. 31, if the Court please. It states the following with respect to Salamanca: It says under "Location", "Main Street, Salamanca, New York".

"Nature of interest." "Fee." "Date of acquisition, July, 1927."

"From whom acquired. Ambuski, et, al."

"Nature of improvement now existing. None, used as parking lot."

The date of that interrogatory, I believe is some time in 1941.

[fol. 3360] Mr. McClennen: When does it say the land was acquired?

Mr. Wright: July, 1927.

The Court: Is that the period the Andrews Theatre was then standing?

Mr. Wright: This answer only deals with the unimproved property. I will have the answer as to the theatres in Salamanca. That appears in the answer to interrogatory 17-A, under the "Town Name, Salamanca, Name of Theatre, the Andrews."

"Nature of interest, lessee."

"Extent of interest, 100 per cent."

"Date acquired, October, 1924."

"Owner's interest, if any,——"

did you want the rest of it?

The Court: No, that is all.

Mr. Wright: Again our offer would be limited to the particular part of the paper. There is nothing outlined in this, but the right-hand column which deals with the matter the witness testified to. We are not interested in any other part of the paper other than the right-hand column of the front page.

Mr. McClennen: We object to it. I think that your Honor's ruling in the last case, if followed, would admit it [fol. 3361] over our objection. The article contains somethings not testified to by the witness, even as coming from Mr. Dickerson, if that is the right name, and this is the case of a talk with a local manager of the existing theatre, but I assume that your Honor's ruling would admit this over our objection. I make the objection.

The Court: It may be received the same as the other was. No evidence to show he testified it was the newspaper of that date.

"When was the first time you saw that Exhibit 854?"

"Well, I would say it was about four or five days after this paper was printed, and it was sent to me."

I see no other reference in the testimony of Cohen.

Mr. Wright: I think it is a fair inference if he read the paper that he saw this front page on which this item appeared.

The Court: I will receive it the same as before, anything except the testimony given by Mr. Weber, that is all.

[fol. 3362] (Thereupon the newspaper previously marked as Plaintiff's Exhibit No. 854, was received in evidence.)

Mr. Kallis: That is all.

The Court: Any questions?

Cross-examination.

By Mr. McClennen:

Q. Mr. Weber, referring to the article in Exhibit 854, can you tell me when this theatre was actually completed, which they referred to?

A. I cannot. My memory for dates is not good. The theatre was built some little time after that.

Q. And would you scan down the article and tell us any respect in which the theatre built did not conform to the statement of what was going to be done?

A. I don't think it was built within the four months that was indicated.

Mr. McClennen: We make no contention that it was, but as to the character of the theatre, and so forth.

Mr. Wright: Of course, I think there should be showing first that he is in a position to know.

The Court: I assume if he can state he will state, or if he knows.

[fol. 3363] Mr. Wright: What the characteristics of the present theatre are, he said he doesn't know when it was completed.

By Mr. McClennen:

Q. What is in the article was that it was to contain 1200 seats. You have been in the theatre?

A. I have been in it, yes.

Q. Have you any idea?

A. I would think it would be approximately 1200.

Q. What sort of an appearing theatre?

A. Very lovely theatre.

Q. Is it air-conditioned?

A. Yes.

Q. And does it have modern theatre equipment and fixtures?

A. I am not an expert on the equipment. I should think it was modern.

Mr. McClennen: I think that is all.

Mr. Kallis: That is all.

[fol. 3364] MICHAEL BOUMANSOUR recalled as a witness by and on behalf of the Plaintiff, having been previously sworn, was examined and testified as follows:

Direct examination (continued):

Mr. Wright: Before continuing the examination, I want to correct a mis-statement in the record that apparently was inadvertently made by Mr. McClennen. It was apparently due to the form of my question with respect to Ray Smith's testimony at page 1572, I asked the witness what position did he, that is referring to Ray S. Smith, hold with the Company during the period from August, 1933, through February, 1935. His answer was: "Branch Manager, Albany, November 23rd, 1931 to November 12, 1936." The statement had previously been made to your Honor he had ceased being Branch Manager in February, 1935, which apparently was due to notes made on the form of my question rather than the witness' answer.

The Court: When was it?

[fol. 3365] Mr. Wright: The dates are given by the witness, Branch Manager, Albany, November 23rd, 1931 to November 12, 1936. The statement had been made correctly by Mr. McClennen that the record agreed the deceased to be Branch Manager in 1935, and that was due to the form of my question, apparently, and notes taking on the question asked rather than of the witness' answer.

Mr. McClennen: I should say that that comment was correct. That is the question on page 1572 is, "What position did he hold with the Company during the period from August, 1933 through February, 1935?" And the answer "Branch Manager, Albany," and he then continues "November 23rd, 1931 to November 12th, 1936", and that latter part was not on my notes.

The Court: It is agreed he terminated in 1935.

Mr. Wright: No, I say the purpose of reading this was to correct the statement that he terminated in 1935 for it now appears from the testimony of the Witness Doherty that he continued as Branch Manager until November 12th, 1936. That was when he terminated as Branch Manager.

The Court: All right. You mean was that the Smith who [fol. 3366] succeeded Ayres?

Mr. Wright: Yes.

Q. Mr. Boumansour, going back to the spring of 1937, when you were attempting to get second-run products for

your theatre there, did you notice whether the Schine Malone Theatre was playing major product second-run there at that time?

A. No, nothing that I recall.

Q. The question was whether you noticed whether they were or not? Did you observe whether they were playing second-run or not?

A. I think they were not playing, they were not playing.

Q. As I recall your testimony before lunch, after you began to play second-run the prices at the Malone Theatre then were changed from 40 to 30 downstairs and 20 to 30 in the Balcony?

A. Yes.

Q. And you continued to change——

A. 25 cents.

Q. 25 cents, and when was the next change made, if any, in the admission price at the Malone and your theatre?

A. I couldn't say for sure about the date. There was some change.

The Court: You said you made it during rush hours, certain rush hours, 15 cents.

[fol. 3367] Mr. Wright: Yes.

Q. When was that change made when you dropped your price to 15 cents, during what hour was that?

A. Between 6:30 and 7 o'clock.

Q. When was it you instituted that price, as nearly as you can recall?

The Court: He said when Schine began to give the money away, he reduced his prices.

The Witness: Yes.

Q. What was the date of that?

A. I don't know the date.

Q. You can only fix it at the time the Schine Malone began to give the money away?

A. Yes, the money night.

Q. After that was there any change in the Schine balcony admission price at the Malone?

A. Well the one time the price was changed at the Malone Theatre to 15 cents at any time first-run, when I was charging 25 cents for second-run.

[fol. 3368] Q. Is that 15 cents all over the house or in the balcony?

A. It was the balcony at all times and 15 cents downstairs up to 7:30, 7 to 7:30, I don't recall exactly.

Q. What was the evening price during that period?

A. That was the evening price, that was the evening price.

Q. No, I understand the evening price in the balcony was 15 cents, but I meant the evening price downstairs.

A. Up to 7:30 or 7 o'clock, I don't recall exactly, it was 15 cents also.

Q. Perhaps I should have said after 7 o'clock, what was the price?

A. 30 cents.

Q. Can you tell us the approximate period that those prices continued?

A. Oh, it continued for approximately, I am not sure, for about 7 to 9 months.

Q. And do you know about when the beginning and end of that period was?

A. It lasted until—I don't recall exactly now, I could not tell for sure—I could not tell for sure until when it lasted.

Q. What is your best recollection as to the year in which that period began and when it finished?

A. Well, 1940.

Q. Ended in 1940?

[fol. 3369] A. About, I couldn't say for sure.

Q. It began some time in 1939?

A. Might have started in 1938 and ended in 1939, or 1939 and 1940, I don't exactly know.

Mr. Wright: I will ask to have this marked with the next exhibit number for identification.

(Thereupon document referred to was marked as Plaintiff's Exhibit No. 858 for identification.)

Q. I show you this clipping attached to Exhibit 858, and ask you if you recognize that as a clipping from the Malone Evening Telegram for January 10th, 1939?

A. Yes, sir.

Q. Did you see that at the time it appeared in the paper?

A. Yes, sir.

Q. Now, with reference to the time you saw this newspaper item, identified as Exhibit 858, can you tell us whether about that time, or before or after you had any conversation with any representatives of the Schine Company?

A. After I saw this clipping in the paper, some time after, I took a trip to Albany and I was discussing this article with some branch manager in Albany.

Mr. McClennen: I ask to have that stricken out. He was asked when he next had a talk with the Schine representative.

[fol. 3370] Mr. Wright: Will you read that question again? I think you will notice the question asked only for a conversation with the Schine Company.

The Witness: With the Schine?

Q. Yes.

A. The day that this article came out in the paper I was out of town myself.

Q. Did you see it when you got back?

A. I saw it when I got back.

Q. How many days later was that, do you remember?

A. About one day after.

Q. Did you have any talk with any one from the Schine Company after you got back and saw the article?

A. No.

Q. Then during the year 1938, did you have any conversations with any representatives of Schine?

A. Not that I recall.

Q. And how about during the year 1939?

A. Yes, sir.

Q. When in 1939?

A. I can't exactly tell you the date of when it was, but it was late in the fall.

Q. The fall of 1939?

A. Yes, sir.

[fol. 3371] Q. Whom did you see then?

A. I saw Mr. Art Newman, representing the Branch Office——

Q. I don't think you understood the question. I asked you about who you saw from the Schine Company?

A. Schine?

Q. Yes.

Mr. McClennen: This is in the fall of 1939?

Mr. Wright: I so understand.

The Witness: Mr. Lynch, George Lynch.

Q. Where did you see him?

A. In my office.

Q. Where was that? At Malone?
A. Yes, sir.
Q. Who else was present?
A. Mr. Arty Newman.
Q. Who was he?
A. He represented Republic Pictures, Branch Manager of Albany.
Q. What was said then?
A. Well, the talk was——

Mr. McClennen: This, in this form, is objected to. Who said what?
The Court: State what was said.

Q. Give us the substance of the conversation as near as you can recall it.
[fol. 3372] A. Mr. Lynch and Mr. Newman said we were both working our heads off and not getting anywhere.

Mr. McClennen: May that go out, if your Honor please? The head has apparently stayed on.
The Court: Who said that?
The Witness: Mr. Lynch and Mr. Newman.
The Court: Both said it?
The Witness: Yes, one was saying one thing and the other was saying another thing.
The Court: You are saying now they both said the same thing?
The Witness: Well, pretty near.
The Court: Tell what Mr. Lynch said and what Mr. Newman said.
The Witness: I remember Mr. Lynch said to me that I think I was better to try to lease my theatre to Schine and that would be better for you, and better for the Schine organization, and let this fight be over with.

Q. What did you say?
A. I said I would lease them the place.

The Court: You would what?

The Witness: I told them I would lease them the place.
Q. Did you have any discussion with them then about terms?
A. Yes, sir.
[fol. 3373] Q. What was said about that?

A. I gave them my terms, and it was perfectly O. K. Mr. Lynch went out of my office——

Mr. McClennen: Just a moment.

The Court: Perfectly O. K. might mean different things. What *sis* he say?

The Witness: He said to me "I will have to go out for a few minutes to make a telephone call".

The Court: All right.

The Witness: And he went out to the hotel and he told me at that time when he came back that he had called up Mr. Myer Schine personally in Florida, and that he has agreed that he will take my place at that term that we made.

Q. Was that all the conversation you had with him then?

A. Yes, that is all.

Mr. Wright: Have you the exhibits 82 and 83, I think they were, the agreements between this witness and the Schine Company? Are those marked for identification, or are they in evidence?

Mr. McClennen: Here are identifications 81 and 82.

Mr. Wright: I think those are the numbers.

Q. I will show you these, a lease marked for identifica-
[fol. 3374] tion as Exhibit No. 81 and an agreement marked for identification as Exhibit 82, and ask you if you recognize those as copies of agreements that you made with the Schine Theatrical Company with reference to your theatre at Malone?

While the witness is looking over those, I would like to read an answer from the interrogatories with reference to Malone; interrogatory No. 31, under "Location", is the statement "Pearl Street, Malone, New York." "Nature of interest, option to buy or lease."

"Date of acquisition, January 10th, 1938."

"From whom acquired, Theresa Hines."

"Date on which interest terminated, February 10th, 1939."

"Nature of improvement now existing, commercial building."

Can you answer the question now? Will you read it to him again?

(Preceding question read.)

The Witness: Yes, sir.

Mr. Wright: I will offer these exhibits 81 and 82 in evidence. Those were copies which were produced by Schine, and identified, I believe, at either New York or here.

[fol. 3375] (Thereupon lease previously marked as Plaintiff's Exhibit 81 for identification was received in evidence.)

(Thereupon agreement previously marked as Plaintiff's Exhibit 82 for identification was received in evidence.)

The Court: This is the second lease, is it? The testimony was that there was a prior lease which had expired.

Mr. Wright: I should have read the dates of these. Yes, this is the lease, Exhibit 81, is dated February 14th, 1941.

The Court: Yes.

Mr. Wright: The agreement, Exhibit 82, memorandum of agreement, is dated January 21, 1941, preceding the making of the lease.

The Court: My point is, Schine had leased these premises once before?

Mr. Wright: Before the witness began to operate the theatre, yes, that was in 1936.

Mr. McClennen: Five years before, if your Honor please, and it had expired.

The Court: Yes.

By Mr. Wright:

Q. I call your attention to the date of this agreement, Exhibit No. 82, which is January 21, 1941; is that about [fol. 3376] the date that that agreement was made?

The Court: How is that? Is that about the date the agreement was made?

The Witness: Yes, the second one was made in January.

Q. Was there any difference in the terms of this agreement marked as Exhibit 82 in evidence and the agreement that you had or the terms that you had discussed with George Lynch in the fall of 1939?

Mr. McClennen: That is objected to, he has not yet stated what those terms were.

The Court: He can state what they were.

Q. What were the terms you discussed in 1939 with George Lynch which you just referred to?

A. The price was to be $8600 a year.

Q. The rent, you mean?

A. Yes, and I had to give my services for one year at $70 a week.

Q. In what capacity?

A. As a manager.

The Court: You mean you would receive that in addition to the $8600?

The Witness: Yes, $70 a week as a manager for one year.

Q. Then after you made this agreement marked as Exhibit 82, did you then enter the employ of the Schine Company?

A. Yes, sir.

[fol. 3377] Q. In what capacity?

A. As a manager.

Q. Of what theatre?

A. Of the Malone Theatre.

Q. What was done with the Plaza?

A. Well, the Plaza was operating three days a week, and with the manager of the—Mr. Mead that used to operate the Malone Theatre.

Q. Then how long did you continue as manager of the Malone?

A. About two years, just about, about, I can't say for sure, it might be a couple of months more or a couple of months less, but about two years.

Q. Then have you had anything to do with the theatre since that time?

A. No.

Q. Except as lessor?

A. No.

Mr. McClennen: Just a moment, that would be after May 19, 1942.

Mr. Wright: I suppose as to what has happened to him it is perfectly competent to take him down to the present time.

The Court: When did the two years expire, about what time?

Mr. Wright: Some time in 1943.

[fol. 3378] The Witness: 1943.

Mr. Wright: I don't think it is of any great importance. Just to make the story coherent, I suppose we ought to know.

The Court: I will let it stand. I don't suppose there is anything claimed for it by reason of his employment subsequent to 1942.

Mr. Wright: There is no significance one way or the other. I just wanted to complete it.

The Court: It continued through May, 1942?

The Witness: Yes, sir.

Q. Then the operation of the Plaza Theatre, did that continue through that same period in the same way you have described?

A. Three days a week.

Q. And during this same period, after you became manager of the Malone, and through May, 1942, do you remember what the admission prices were then?

A. Well, at the time that I became manager of the Malone Theatre and was supervising at the same time the Plaza Theatre, our price was 30 cents and 25 cents at the Plaza.

Q. 30 cents, that is all seats, at the Malone?

A. No, 30 downstairs and 20 cents upstairs.

Q. Evening adult prices you are talking about?

[fol. 3379] A. Yes, sir.

Q. And 25 cents at the——

A. Plaza.

The Court: What did you say it was, 30 and 25 at the Malone?

The Witness: No, 30 and 20; 20 cents in the balcony and 30 on the mezzanine and the Plaza was operating at 25 cents, but both houses were running on the first-run pictures.

Q. That is during this same period?

A. Yes, sir.

Q. Were there any second-run pictures played at the Plaza during that period?

A. No, not that I recall.

Q. I simply want to call your attention, Mr. Boumansour, to the paragraph in Exhibit No. 82, Paragraph 4, which states "Boumansour agrees in the event a lease is executed to deliver an agreement to Schine not to engage in the motion picture business in Malone, New York, or in any town in which Schine operates a motion picture theatre or in any

town within a radius of 20 miles therefrom during the term of said lease."

Did you execute such an agreement?

The Court: He has already said he did.

Q. This refers to an agreement to make an agreement; [fol. 3380] 81 is the agreement to make the lease?

The Court: They are both in evidence, and the contract shows——

Mr. Wright: I am not sure that the agreement not to compete is in the—it is apparently not in the lease. I want to find out whether there was another agreement executed.

The Court: You mean a separate agreement?

Mr. Wright: Yes, whether we have them all here or not. Now, would you read the question?

(Last question read.)

The Witness: Yes, sir.

Q. Now, can you tell us about what the date of that was, or was that——

A. About a month ahead of the lease.

Q. Now, have you been able to locate a copy of that agreement?

A. Of this?

Q. No, the agreement not to compete that you just referred to.

A. To locate a copy of this?

Q. Perhaps you did not understand me. I asked you did you execute any agreement, after you made the agreement Exhibit No. 82 here, other than the agreement that is set forth in this Exhibit No. 81?

[fol. 3381] A. No.

Q. Which is the lease?

A. No.

Q. The lease agreement then is the only agreement you made?

A. That is it.

Q. I call your attention to the fact that the lease doesn't contain in it an agreement not to compete, or at least, I didn't read it there. You might look at the lease.

The Court: You called attention to it. What is your question?

Mr. Wright: Read it.

(Foregoing record read.)

Q. Did you make any other agreement with Schine with reference to leasing the theatre or not competing, other than the agreements that are set forth here in Exhibits 81 and 82?

A. I don't recall any other.

Q. Then, as far as you know, those were all that you made?

A. Yes, sir.

Mr. Wright: You may cross-examine.

Cross-examination.

By Mr. McClennen:

Q. Did you promptly notify the Department of Justice of the making of this agreement, Exhibits 81 and 82?

[fol. 3382] A. No.

Q. You wrote the Department of Justice about it, didn't you?

A. I wrote the Department of Justice?

Q. Yes.

A. No.

Q. What?

A. No, I don't recall that.

Mr. McClennen: Will you mark this paper for identification, please?

(Thereupon document referred to was marked as Defendants' Exhibit D-133 for identification.)

Q. Did you write the Department of Justice in the terms of D-133 for identification?

A. Yes, I did write that.

Q. You did write that?

A. Yes, sir.

Mr. McClennen: I offer that.

Mr. Wright: We have no objection, except that it apparently is immaterial. I don't understand what it is supposed to prove.

Mr. McClennen: Well, if you have no objection we won't discuss that.

Mr. Wright: I think the Court ought to see it.

[fol. 3383] Mr. McClennen: Well, if you object to it, why, yes.

Mr. Wright: Yes, I object to it as immaterial. I don't think it has any bearing on the suit one way or the other.

The Court: I want to see the second lease agreement there, too.

(Documents examined by the Court.)

The Court: Overruled. Received.

(Thereupon the document previously marked as Defendants' Exhibit D-133 for identification was received in evidence.)

Mr. Wright: If the Court please, there is no claim on our part that he had any complaint after he leased the theatre.

Mr. McClennen: No, I understand it to be the Department of Justice's contention that it is not material that he promptly notified Department of Justice of this agreement. We claim it is material.

Exhibit D-133 is addressed to the Department of Justice, Washington, D. C., and reads:

"Re U. S. against Schine, H. B. 60-6-30-33-3.

[fol. 3384] Gentlemen: This is to advise that I have succeeded in disposing of my theatre as planned. I have no further complaints. Everything is satisfactory here. Very truly yours, Michael Boumansour."

The Court: What is the date of that?

Mr. McClennen: April 4th, 1941.

The Court: All right.

By Mr. McClennen:

Q. When you said that your letter to the Department of Justice was in the early part of June, 1937, had you been shown the letter of June 30th, 1937, which was produced by plaintiff's counsel here this morning?

A. I don't remember that letter.

Q. What?

A. I don't remember that letter.

The Court: Perhaps he did not understand your question.

Q. You remember that you testified this morning?

A. Yes, sir.

Q. That you wrote the Department of Justice in the early part of June, 1937?

A. Yes, sir.

Q. When you testified to that——

A. Yes, sir.

Q. (Continuing)—had you been shown the date of the letter to the Department of Justice of June 30th, 1937?

A. I don't remember.

[fol. 3385] The Court: At that time when you testified you wrote to the Department early in June 1937, had you been shown this paper, purporting to be a letter dated June 30th?

The Witness: I don't remember.

By Mr. McClennen:

Q. You don't remember. You arrived here in Buffalo when?

A. This trip? Do you mean this trip?

Q. This trip.

A. I arrived here Saturday morning.

Q. Saturday morning, what date?

A. I haven't got a calendar in front of me.

Q. I will tell you what the Saturdays are that occurred recently. One is the 21st of October, 1944, another is the 14th of October, 1944 and another is the 7th of October.

A. I guess the 21st.

Q. Had you been in Buffalo recently before that?

A. Yes, sir.

Q. When did you arrive that time?

A. Monday morning.

Q. Monday morning, what date?

The Court: What Monday do you mean? A week ago Monday.

The Witness: Week ago Monday.

[fol. 3386] By Mr. McClennen:

Q. That would be the 16th of October, 1944?

A. Yes, sir.

Q. Since October 16, 1944 have you had your attention

called to this letter of June 30, 1937 to the Department of Justice?

A. Yes, sir.

Q. When?

A. Just about a week ago.

Q. About a week ago?

A. That Monday that I came here.

Q. That is some one of the attorneys for the United States showed you that letter of June 30, 1937?

A. Personally, I asked to see the file.

Q. You asked to see it?

A. Yes.

Q. And you saw it and you were in the office of the Counsel for the United States when you saw it?

A. Yes, sir.

Q. And when you said that it was the early part of June 1937 did you recall that it was in fact the 30th of June, 1937?

A. It was written the 30th of June 1937.

Q. Yes, and when you said it was written in the early part of June 1937, did you remember that it was actually [fol. 3387] written on the 30th of June, 1937?

A. Really, it has been so long that I don't recall all these dates.

Q. Let us go back to see how long your memory really is. You have just said that in the office of the Counsel for the United States last week you saw this letter of June 30, 1937. Do you remember saying that?

A. Maybe I did.

Q. Maybe you did. Well, the reason that you just testified that you did was because you thought that you did?

A. Yes, even if you ask me again, I will have to say it over again. If it is really the 30th, because my memory is very vague.

Q. What I have asked you is having seen that letter dated June 30th, 1937 last week, did you remember this morning that that was the date of the letter?

A. I will have to see it over again in order to testify for sure, because all my dates I give you, it is only possible that is the date, because I don't recall any of these dates.

Mr. McClennen: May I see the letter?

Mr. Wright: It is right up there in front of the witness.

Mr. McClennen:

Q. This Exhibit 857 for identification you say that you saw in the office of the United States counsel last week?
[fol. 3388] A. This letter?

Q. Yes.

A. No. I saw a file but not this. I wasn't even interested.

Q. And counsel for the United States showed you this letter?

A. This letter? No. I saw another file but I didn't see this.

Q. Oh, you didn't see this letter. You did see a file of correspondence of yours?

A. No. Do you want to know what I saw?

Q. I want to know as far as you know, and I only want to know that far. In going over the matter in the office of the counsel for the United States you now say that you were not shown this letter for identification number 857?

A. No.

Q. When did you make up your mind to say that that letter was written in the early part of June? (There was a pause.)

The Court: Can you canswer?

The Witness: I can't answer that question. It is a question that makes me say why I said it was in the early part of June.

Q. What?

A. Well, I thought it was in the early part of June.

Q. When did you make up your mind that it was in the early part of June, 1937 that you wrote this letter dated
[fol. 3389] June 30th, 1937?

A. I can't even answer you.

Q. What?

A. I can't even answer your question.

Q. Was it last Saturday, 1944?

A. When did I tell you that, this morning? I told you that this morning. It was this morning that I made my mind up it was the early part of June?

Q. Do you remember just what it was that led you to make up your mind this morning that it was in the early part of June that you wrote this letter of June 30, 1937?

A. Yes. I could make up my mind, if you want to let me explain.

The Court: Just answer the question, and we will get along faster.

(Last question was read.)

The Court: It calls for a Yes or No answer.

A. Yes, I could explain.

Q. You never made up your mind to give that answer until the morning of October 23rd, 1944, have you?

Mr. Wright: That assumes, if the Court please, that he made up his mind at some other previous time as to what to say. There isn't any evidence of that at all.

The Court: I don't know. It may be just at that time [fol. 3390] or prior to that time. The question is tell when you made up your mind, the date. Was it in the early part of June. Now counsel asked you if you made up your mind today, the time when you testified you made up your mind.

A. Your Honor, I knew why I told June, because I knew what happened in June, and I was exhausted and I had to do such things. I do remember it was in June. I don't remember if it was the first part of June or the last part, but I remember it is early part of June. I see the letter the 30th of June and it is the 30th of June.

Q. You have testified to a contract that Mr. Ayres showed to you, concerning which you said that the prices were too high but you signed it?

A. Yes. I don't say exactly it is Mr. Ayres either. It is either one, Mr. Ayres or Mr. Smith. I don't exactly recall if it is Mr. Smith or Mr. Ayres.

Q. You have no memory whatever of which it was?

A. One of the two.

Q. But you don't remember at all. Your mind is perfectly blank?

A. Yes.

Q. As to which it was.

Mr. McClennen: I will ask to have this marked for iden- [fol. 3391] tification.

Mr. Wright: Is that a contract by Warner? We were asked for those contracts and we were told they were not available.

The Court: We haven't got through.

Mr. McClennen: I think it would be desirable to have it marked for identification.

Mr. Wright: So do I. I think it would be desirable in the future that contracts be made available to us the same time they are to you, but we subpoened them.

The Court: Mark it.

(Contract referred to was marked Defendant's Exhibit D-134 for Identification.)

Q. Is this your signature on Exhibit D-134 for identification, your signature is what I was asking you. You will find it down at the bottom of the contract. Is that you signature?

A. Yes, sir.

Q. Is that the contract which Mr. Ayres or Mr. Smith showed you and in which you criticised the prices in and then signed.

A. Yes, sir.

Q. And you dated in some pictures at the time of that [fol. 3392] interview, did you not?

A. I don't remember.

Q. Well, perhaps I misunderstood your testimony. I will ask you definitely, did you date in some pictures, on the date that you signed that contract, protesting about the expense or the price of that?

A. I might have. I don't say I didn't.

Mr. McClennen: I will now ask to have this paper marked for identification.

(Contract thereupon marked Defendant's Exhibit D-135 for identification.)

Q. I show you paper marked Defendant's Exhibit D-135 signed by you?

A. Yes, sir.

Q. Do you recall on that same date you made a contract with Warner for some first-run as well as for some second-run pictures?

A. I don't remember. I may have. If they were pictures.

Q. Look at this Exhibit D-135 and see. Aren't those pictures?

A. Those are gun pictures.

Q. Then I will go back. Do you recall that you made a contract with Warner for some gun pictures on that same day?

[fol. 3393] A. On that say- day?

Q. Yes.

A. I don't remember, sir.

Q. These are gun pictures which you contracted for first-run on that same day?

A. I don't remember now if they are first or second-run. Does it say on it? It must be.

Q. You look at it. I am asking for your recollection about it.

A. Yes, it says first-run on the contract.

The Court: First-run on the contract?

The Witness: Yes, that must have been first-run pictures.

Q. At the time of your signing D-134, Mr. Ayres, or Mr. Smith put before you a contract for 60 pictures of the Warner and First National productions of the '36-'37 season, second-run, did he not?

A. Yes, there is 60 pictures here, I guess.

The Court: Would those be D-134 you say, is that the contract, what does D-134 include?

Mr. McClennen: 134 is the one referred to for 60 second-run pictures.

The Court: For 1936-37?

Mr. McClennen: For the 1936-37 product.

The Court: You now just asked him about another contract which calls for 60 pictures.

[fol. 3394] Mr. McClennen: That is the one. 134 is the 60 pictures.

(Previous question read.)

The Court: These two contracts, I take it, are the same date, one is for a year's first-run.

Mr. McClennen: At the same time that he put before you the contract for the second-run, the 60 pictures he put before you a contract for six gun pictures, first-run?

The Court: He testified to it before that.

The Witness: Yes.

By Mr. McClennen:

Q. And that was on the 14th of June, 1937?

A. That is what I said there.

Q. At the time of testifying that your letter dated June 30th, 1937, was sent in the early part of June, 1937, you had in mind a reason why it was important to get that letter into the early part of June, 1937, did you not?

A. I can't remember, but I know.

Q. I ask you whether you had in mind why it was important.

A. I couldn't answer you that.

Q. Did you have any conversation with Mr. D. Struwe, a Warner salesman in the early part of 1937?

A. Yes, I believe I did.

Q. And did you say to him that you intended to go into a [fol. 3395] second-run policy starting May 1, 1937?

A. Maybe I did.

Q. And did he offer you a 60-picture deal, and you say that you only wanted 30 at that time, these relating to the present season '36-'37, and did he then offer you 30 pictures of '35-'36 product, second-run, and you say that you would not consider any proposition except a thirty-picture deal on the present season?

A. I don't remember.

Q. Is there anything in your memory to the contrary of that?

A. I couldn't tell you contrary and I couldn't tell you for either side.

Q. Now, can you tell me whether such conversation as you did have with him occurred in the early part of February, 1937?

A. I don't remember it.

Q. You do remember, don't you that you told him that you wanted only 30 pictures at that time?

A. I don't remember that, also.

Q. And do you remember now that he offered you 30 pictures of the 1935-36 season or 60 of the 1936-37 season?

A. I don't remember that, either.

Q. Well, I noticed there is the reference to May 1st, as the time when you were thinking of beginning on your second-run policy. How long before that did you talk with [fol. 3396] anybody connected with Warner's, either salesman, or branch manager, concerning the second-run product

for that policy you were thinking of beginning May 1st, 1937?

A. That must have been before June that I talked with mostly all film exchanges in Albany that I would like to go into a second-run policy.

Q. That is before June, you had that?

A. Before June.

Q. And before May, 1937, you had had that talk, hadn't you?

A. I don't remember before May, but I knew it was before June.

Q. Do you remember whether Mr. Struwe's visit to you was before or after you had mentioned your second-run policy to either Mr. Ayres or Mr. Smith?

A. I don't remember, sir.

Q. You don't remember whether it was before or after? You never came to a willingness to take the whole 60 Warner pictures at the Warner prices until June 14th, 1937, did you?

A. No, I couldn't answer you that, either.

[fol. 3397] Q. You had two talks with Mr. Grassgreen about selling you Fox second-run, did you not?

A. Yes, sir.

Q. And how far apart were those two talks?

A. Between May and later; between May and later on.

Q. That is the first one?

A. Yes, sir.

Q. Was in May?

A. I couldn't tell you for sure; it was while I was in Albany on other business, I called on him, but I could not tell you for sure which exact months.

Q. It was some time before May, wasn't it?

A. Not for second-run. I have seen him for some slough pictures, before.

Q. Wasn't it some time before May, 1937, that you talked with him about second-run?

A. Maybe I did, too, I don't say I didn't.

Q. What is the first time that you remember talking with him on the second-run subject for your Plaza Theatre in Malone,—Mr. Grassgreen?

A. I couldn't tell you for sure which date, it is impossible.

Q. Well, may it have been in February?

A. Could have been in May, could have been in January, it could have been in December, I don't recall.

Q. That is, December of 1936?

[fol. 3398] A. Surely. I don't recall.

Q. That is, as a matter of fact, you are wholly unable to state the date of the conversation?

A. No.

Q. That is true, is it?

A. That is true.

Mr. McClennen: If your Honor please, I make this part of the cross-examination without waiving my objection to the Grassgreen conversation.

Q. Will you tell me the first time you saw Mr. Grassgreen, what you said and what he said on the subject of letting you have second-run?

A. The first time?

Q. The first time?

A. About second-run?

Q. About second-run.

A. I don't remember, sir.

Q. Well, but didn't you tell us this morning?

A. I told you about first-run, maybe; I didn't tell you about second-run.

Q. Not about second run?

A. Maybe I did, but I don't remember the date.

Q. But if you did tell us——

A. I know I have called on all of the exchanges.

[fol. 3399] Q. Just a moment, I was asking you about Mr. Grassgreen?

Q. Do you remember a word that Mr. Grassgreen said to you on the subject of second-run?

A. I don't.

Q. You don't?

A. Yes, if I can remember the words?

Q. You don't remember?

A. Yes, I do remember the words, I will go twenty years more, and I will remember them.

Q. That is what I asked you; tell me, not giving the date, but on the first occasion when you discussed second-run with Mr. Grassgreen, what did you say to him and what did he say to you?

A. What did I say to him and what he told me, is that what you want to know?

Q. That is what I asked you.

A. I asked him if there was a possible chance of getting second-run pictures. He laughed and he said "Bouman-sour, forget about it, we are not interested at all of selling second-run to Malone, because we have a franchise with our first-run, and we are satisfied, so just forget about it."

Q. Is that all that he said?

A. That I remember.

[fol. 3400] Q. Now, did you have another conversation with him on the subject of second-run in the spring of 1937?

A. I don't remember.

Q. You don't remember any?

A. No.

Q. And you don't remember anything that was——

A. I must have had, because——

Q. Not what you must have had; you don't remember any?

A. No.

Q. And you don't remember in any of the conversations as to second-run with Mr. Grassgreen any variation from what you have described in this first conversation?

A. I remember seeing him once in a restaurant. I was downtown in Albany and I asked him something about it, and he said "Come over and see me at the office," and I don't know if I did go that time or not, but I remember he sent me a letter to that effect, that he could not sell me second-run pictures, because on account they had a good first-run account in the town, and they were pleased with the income of it, and they didn't want any more.

Q. Just a moment. All I asked you was what he said, not about a letter; what did he say about second-run in the restaurant or subsequent to the meeting in the restaurant in conversation to you about second-run?

[fol. 3401] A. That is exactly the same what he wrote me in the letter.

Q. Well, if it was exactly what he wrote you in the letter, then tell us what he said without reference to the letter; what did he say in his talk with you and what was all that he said on the second-run subject?

A. I just told you. I been repeating that conversation over and over again.

Q. I am sorry to bother you, to ask you.

A. No bother.

Q. To ask you to state again in the language that it occurred what he said?

A. He said that they have one first-*one* customer in the Town of Malone, and they were satisfied with the income of it, and they had no room for a second-run with their Company.

Q. And that is all that he said in any of those spring interviews on the subject of second-run, is it?

A. Yes, sir.

Q. In a conversation that he had with you either in the very early part of May, 1937 or before that, did he inform you that if you would buy 100 per cent product, he would consider the deal and advise you immediately as to his disposition in the matter of a second-run sale?

A. If he did tell me that?

Q. That was the question.

[fol. 3402] A. Well, this question never was brought up to me.

Q. He never said anything of that kind?

A. No, I would have kissed his hand back and forth if he ever did.

Q. I didn't catch that last.

A. I said I would have kissed his hand back and forth.

Mr. McClennen: Will you mark this for identification?

(Thereupon document referred to was marked as Defendants' Exhibit D-136 for identification.)

Q. Is this your signature on D-136 for identification? Perhaps you can tell right from looking at the signature without reading the whole of the letter?

A. Yes, I wrote that.

Q. That is your signature?

A. Yes, sir.

Q. Now, I will ask you is this the truth,—"I", meaning you and "you" meaning Mr. Grassgreen,—under date of May 6th, 1937:

"Some time ago when in Albany I had a talk with you in regard to second-run policy. You informed me at that time that if I would buy 100 per cent product, you would consider the deal and advise me immediately as to your disposition in this matter."

Is that a true statement?

[fol. 3403] A. Yes, I wrote that.

Q. Now, when he said that he would consider such a product, did you kiss his hand back and forth?

A. He never considered it at all.

Q. I asked you if you kissed his hand back and forth when he told you that?

A. Yes, sir.

Q. You did?

A. At that time?

Q. Yes.

A. Well, this talk——

Q. No, no, just the hand and the kiss.

A. I didn't kiss him.

Q. You didn't?

A. No, I didn't kiss him.

Q. Well, now, that conversation was some time before 1937, wasn't it?

A. Yes, sir.

Mr. Wright: May I see that, please?

(Defendants' Exhibit D-136 handed to and inspected by Mr. Wright.)

Q. Well, now, why didn't you kiss his hand back and forth when he made that proposition to you?

A. Why, because my theatre wasn't open at that time. I asked him. My theatre wasn't open at that time. I asked [fol. 3404] him, when he refused me first-run, I asked him if there was a possibility of second-run.

Q. In what month was that?

A. That was before I opened up. It must be early October, or something like that.

Q. Early October?

A. '36.

Q. 1936. So that when you said your conversations with him on the subject of second-run were between December and May, you were in error, were you not?

A. No, I wouldn't say I was in error.

Q. Now, when you opened and for some months thereafter, with the Republic and Monogram first-run and rejects of the first-run of the other distributors, you had a sufficient number of pictures with which to operate your theatre?

A. Yes, sir.

Q. Did you not?

A. Yes, sir.

Q. And you didn't consider the matter of going to a second-run until you found that you were getting short of first-run pictures, is that correct?

A. Correct, sir.

Q. Can you remember whether you had any conversation with any distributor's representative as to second-run [fol. 3405] pictures before your conversation with the Warner representative?

A. Sure, I did.

Q. You are sure of that?

A. Yes, sir.

Q. Well, now, which one did you have any talk with before the early part of February, 1937, and I arrest your attention on the date that I showed you in the Struwe matter?

A. I don't remember, sir, the date.

Q. Do you remember any with any other distributor's representative before the early part of February, 1937, or earlier than the talk with Mr. Struwe on the subject of second-run?

A. I don't remember.

Q. Can you remember of any one of them with which you discussed second-run before you discussed it with Mr. Struwe?

A. I never discussed anything with Mr. Struwe, never did.

Q. You told Mr. Struwe, didn't you that you were thinking of going to second-run May 1st?

A. If I tell him? I told him——

Q. Yes.

A. I don't remember telling him, but I didn't do any business with him.

[fol. 3406] Q. Came to see you, didn't he?

A. Oh, he used to come in every time he came to Malone. I might have told him, too, you see.

Q. Do you remember mentioning your plan of going to second-run at any time before you talked with Mr. Struwe on that subject?

A. I was planning even to go into second-run before I did even open the theatre at all.

Q. What I asked you was, whether you remembered any talk about getting second-run pictures with any distribu-

tor's representative before a talk with Mr. Struwe on that subject?

A. Sure.

Q. Well, now, keeping in mind the early part of February, 1937, tell me in person in each distributor's office, with whom you had discussed——

A. Second-run?

Q. Second-run?

A. With all the major distributors.

Q. No, no. The persons, the names.

A. The names?

Q. Yes.

A. I will give you Mr. Pielow.

Q. Mr. Pielow of——

A. Metro-Goldwyn-Mayer. I talked with either Mr. [fol. 3407] Ayres or Mr.——

Q. Smith?

A. Smith of Warner Brothers.

Q. Yes.

A. I have talked with—talked with the Paramount Branch Manager.

Q. Mr. Eastman?

A. Eastman, and Mr. Fox of Columbia.

Q. Columbia?

A. Mr. D. C. Flannigan of R.K.O.

Q. Do you remember any others you talked with about second-run before this talk with Mr. Struwe?

A. Yes, sir.

Q. Now, what others?

A. Mr. Grassgreen of Fox.

Q. Grassgreen of Fox, and what others?

A. Well, that is the ones I talked with.

Q. Is that all?

A. Pretty near.

Q. Let us make it complete. Did you talk with somebody from Universal?

A. Yes, sir.

Q. Who was that?

A. I don't remember. I don't remember the name of the branch manager at that time, because they changed in a [fol. 3408] short time the manager, and I don't recall.

Q. And did you talk with any branch manager of United Artists?

A. No, I met him once, a few months after that, in Albany. They have no branch in Albany, but I met him. He was——

Q. Then all these others you talked with about your project of second-run before February, 1937, did you?

A. I don't remember, sir, if it was before that.

Q. You have no recollection whatever of ever talking with any one of them before the talk with Mr. Pielow?

A. I have talked with them regarding second-run, but the date and the time I can't tell you.

Q. You have no present recollection of talking with any of them before the talk with Mr. Pielow in the early part of February, 1937?

A. I don't remember.

Q. Well, do you remember when Mr. Pielow talked over the matter with you, whether or not you had had any proposition for a second-run?

A. Yes, I had, sir.

Q. Before his?

A. No, if I had a proposition already from any other person for second-run, no, at that time, when I asked him for second-run, there was no other proposition coming in. [fol. 3409] Q. And do you remember now when it was that you saw that the rejects and the Monogram and the Republic first-run were likely not to last you much longer in the operation of the theatre?

A. Well, when I was exhausted of Republic, oh, four or five years previously——

Q. I am asking you the time.

A. The time?

Q. When you foresaw that your Monogram, Republic and rejects of the other distributors were likely to prove short of your requirements; when that was?

A. That was around May.

Q. May of 1937?

A. 1937, around, I don't say for sure, either.

Q. But that is the best you can fix the date, around May?

A. It might be May; it might be June.

Q. What is your best recollection as to the time?

A. Oh, I would say between May and June.

Q. And when you saw the possibility that you wouldn't have enough of these first-run, did you take up for consideration the matter of going on with the first-run as far as you could and getting some second-run in addition to help you out?

A. I could not answer you that, sir.

Q. You don't remember giving any consideration to that?

[fol. 3410] A. Myself, particularly?

Q. Yourself.

A. I would have rather opened up with second-run, but I could not get the merchandise to open up, so that is why I had to take what was on the market.

Q. I was asking you about——

A. I know what you asked.

Q. Why not answer it instead of saying something else?

A. You put us in a position, so we have to answer you some way to clear your mind of what is going on.

Q. I see.

A. Yes.

Q. I am glad you got that point.

A. Yes.

Q. What I asked you was, when the time was when you foresaw the possibility of the Monogram and Republic and other rejects proving insufficient to run your theatre, and taking up the consideration of getting some second-run, and you told me that it might have been in May or June, 1937. Now, what I have asked you is, did you consider the possibility of keeping on with your first-run as far as that would go and supplementing it with second-run; did you consider that possibility?

A. I can't answer that, neither.

Q. You have no recollection of considering that?

[fol. 3411] A. No.

Q. Well, does it lie in your mind that there was a time when you wanted to get 30 second-run pictures right away in order to show them?

A. I don't remember.

Q. And isn't it a fact that at that time Mr. Struwe told you that he would sell you the whole 60 of the 1936-37 run, but wouldn't sell you half of them?

A. There was never any business connection between me and Mr. Struwe about pictures. He used to come in as visiting, but never talked of business, because he was never allowed to talk business with me. That is what he always told me. He never talked business with me.

[fol. 3412] Q. Well, whether we call it business or not, you did tell him that you were intending to go to a second-run policy?

A. I may have.

Q. And you told him that you were planning to start it about May 1st?

A. I may have.

Q. And he offered you a sixty-picture deal and you said you only wanted thirty?

A. Never offered me any deal.

Q. Well, now, I wish you would look at this memorandum and see if it is not an accurate memorandum of a conversation between Mr. Strueme and you. That is the only one that relates to you.

A. I never had any business as far as a picture deal with Mr. Strueme.

Q. That isn't what I asked you. I asked you if that is not an accurate memorandum of that conversation?

A. I don't remember.

Q. You don't remember anything but what that is true, do you?

A. No.

Mr. Wright: Has that been identified?

Mr. McClennen: No. I will have the memorandum which I have shown the witness identified, being a memorandum [fol. 3413] of February 4, 1937 and approximately identified as being that which relates to the Plaza, Malone.

(Memorandum referred to was marked Defendant's Exhibit D-137 for identification.)

Mr. Wright: Do you mind if I see it?

(Document handed to Mr. Wright.)

Q. From 1922 to the fall of 1936 did you have any dealings with the branch managers of any of the distributors at Albany?

A. Between 1922 and 1936? I don't remember.

Q. Did you have any moving picture business in those 14 years?

A. Part time, yes.

Q. At the Plaza?

A. Yes.

Q. What was that part time operation? Give us the time of it.

A. I don't remember exactly now, but it was at least several times. I don't recall exactly now how long I have run the theatre myself.

Q. Can you recall any period from 1922 to 1936 when you operated the theatre yourself?

A. No, I don't remember.

Q. Is it your best recollection that you did not operate [fol. 3414] the theatre in that period?

A. I know that between 1922 and 1936 that was fourteen years——

Q. Perhaps that figure will enable you to answer the question, whether you operated yourself a moving picture theatre in that period?

A. I remember operating it, but I don't remember how long, and what was the term?

Q. Between those years?

A. Yes, I did operate the place.

Q. What was it between 1922 and 1936 that you operated?

A. Because the theatre was opened. I opened this myself.

Q. What is the period, I am asking you.

A. I don't remember.

Q. Give us some idea.

A. I haven't any idea. I haven't got these figures.

Q. Did you operate that theatre at any time between——

A. Yes, after it was completed. I operated it.

Q. That was back in 1922?

A. 1922.

Q. For a year or so?

A. I don't remember how long, but I knew after I operated it for a short time the competition was very severe, I leased it for five years.

Q. And you leased it in about 1923?

[fol. 3415] A. Maybe.

Q. After that time——

A. I took possession of it.

Q. After that time?

A. After the five years.

Q. After that time in 1923 up to 1936 did you operate yourself?

A. I think I did for a short time.

Q. When was that?

A. I don't recall the date.

Q. Was it in 1928 or thereabouts?

A. I couldn't tell you for sure.

Q. Did you operate that theatre at any time between 1930 and 1936?

A. I don't think so.

Q. Between 1930 and 1936 did you have dealings with the branch managers at Albany of the various distributors, as far as you can recall?

A. I don't remember.

Q. Do you remember of any?

A. No.

Q. And you were in Europe in 1935?

A. Yes.

Q. And after the time of your seeing the branch managers as you testified to it, in the fall of 1936, you have had [fol. 3416] no occasion to deal with those particular branch managers, had you?

A. I don't think so.

Q. Did you know the policy, I mean, of changes a week on which the Malone Theatre was operating in the period a year or two prior to the end of their lease in September, 1936?

A. No, I didn't.

Q. Did you know whether or not they were operating on a policy of four changes a week in that period of say the season of 1934-1935 up to the end of 1936?

A. Well, I made a check of that.

Q. And was that the policy?

A. The policy of three changes a week and four changes a week.

Q. Three of those changes were double features and one single feature?

A. Three changes of double some weeks, three changes of double and one change of single.

Q. Very soon after you opened, did you place an advertisement in the newspaper that the newspaper ad as a coupon with 25 cents would admit two adults to your theatre?

A. Yes.

Q. That is, almost at the outset you advertised a virtual 12 and one-half cents admission?

[fol. 3417] A. Yes, sir.

Q. And you were operating at that time on first-run pictures?

A. Yes, sir.

Q. And soon after did you institute a dish give-away?

A. Yes.

Q. Those dishes cost what, something like 10 or 11 cents apiece?

A. Yes, sir.

Q. So that with a 12-½ cents admission you could get an 11 cent dish, is that it?

A. No.

Q. 25 cents admission for one and the other going in free, we will say, with a coupon?

A. No.

Q. You couldn't get an 11-cent dish?

A. No.

Q. What kind of dishes were those that you could get at that time?

A. They were ten-cent dishes.

Q. Ten-cent dishes.

A. Yes, but we were not giving it away to a person who goes in for 12½ cents.

Q. How much did he or she have to pay?

A. The person that has a dish has to pay the regular price [fol. 3418] of 25 cents.

The Court: A Dish for each one of them, everyone of them?

The Witness: No, just the ladies.

Q. Very early in 1937 you instituted the prize contests also, did you not?

A. Prize?

Q. Prize contests.

A. I don't know what you mean.

The Court: Prize contests.

Q. Give away a prize on some contest?

A. I don't remember that.

Q. You don't remember anything of that?

A. No.

Q. After you instituted your second-run policy you used at times to announce from the stage, did you not, to patrons that there is no use wasting their money paying high prices to see pictures anywhere else, that they would be coming along soon in your house?

A. I said that on one picture.

Q. Which picture was that?

A. It was a Metro-Goldwyn-Mayer picture.

Q. What was the picture?
A. "Boystown."
Q. Pretty good picture, wasn't it?
A. You bet, a darn good one.
[fol. 3419] Q. You made that announcement?
A. Yes.
Q. At the time that the picture was playing in the other theatre, did you not?
A. If you will let me explain.
Q. No, just that time, it doesn't require any explanation. Did you tell us it was when that other picture was playing in the other theatre, was it?
A. Yes.
Q. Were you at all familiar with the Code of Fair Practices in the moving picture industry that the President approved in November, 1933?
A. Yes, sir.
Q. And you knew that that had been disapproved?
A. Yes, sir.
Q. Then you instituted a policy of "Lucky", did you not?
A. Yes, sir.
Q. Tell us what "Lucky" is.
A. "Lucky"?
Q. Yes, describe it.
A. Lucky is a game very similar to Bingo.

The Court: Similar to what?

The Witness: Similar to Bingo. Your Honor, you have five beans and you put them on the B*I*N*G*O and in Lucky, Lucky is just contrary to Bingo. It is just to make [fols. 3420-3422] it from Bingo to Lucky. It is a game very much like Bingo.

The Court: You play it in the theatre, you mean.

The Witness: Yes.

Q. You instituted that in your theatre in 1937?
A. I don't remember, but I had the Lucky game?
Q. What?
A. I said I don't remember the date, but I had the game.
Q. You sought to have the distributors make you an allowance for the cost to you of the Lucky performance, did you not?
A. On some percentage pictures.

The Court: I think we had better suspend at this time until tomorrow morning ten o'clock.

(Whereupon a recess was taken until Tuesday, October 24th, 1944, at 10 a.m.)

[fol. 3423] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223

UNITED STATES OF AMERICA

vs.

SCHINE CHAIN THEATRES, INC., et al., Defendants

Continuation of trial before Honorable John Knight, United States District Judge for the Western District of New York, October 24th, 1944, 10 o'clock A.M.

Appearances: Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Special Assistants to the Attorney General, and Philip Marcus, Esq., and Milton Kallis, Esq., Special Attorneys, in behalf of the United States.

Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homans, Esq., and Edward M. Antevil, Esq., appearing for the Defendants.

[fol. 3424] PROCEEDINGS

The Court: I have examined a portion of the proposed exhibits and referred to the objections raised in them. I understood you yesterday to say that while your objections applied to all of them, certain of those were not objected to. I got that impression.

Mr. McClennen: No, they are all objected to.

The Court: I thought you said perhaps some of them were not included.

Mr. McClennen: Some of them had special objections that are not referred to in the general narrative, because those were not applicable to all of them.

The Court: I thought there were some. While your objections were general, I thought you meant there were certain of them that there was no objection to. The point of

my statement is simply this: Admission of these documents involves a question about which the Court should be specially careful, I think, so I would like you to submit some authorities if you have them that will bear on the question of the admission of these documents. Some of them may [fol. 3425] be differentiated, I don't know. I did not examine enough of them to determine that. I went home last night and went over some of these, the general character of them.

Mr. McClennen: We have submitted our authorities in the preliminary printed memorandum, and I referred to them in the notation.

The Court: Does that cover the question of the admission of inter-company communications?

Mr. McClennen: It seemed to me that it did.

The Court: What have you to say, Mr. Wright?

Mr. Wright: We will be glad to submit a further memorandum, if your Honor please. I think at the time we submitted a trial brief, we also included a general discussion of authorities with reference to admissibility of evidence of that character. Of course, as to a specific discussion of each, we can give your Honor a memorandum with respect to any particular document that you may have some question about.

The Court: What I am concerned with is the question of the introduction of these inter-company reports and answers as concerns the question of necessity of the produc- [fol. 3426] tion of the authors of these communications. These are admissible, I take it, as inter-company statements, made by one who is a co-conspirator.

Mr. Wright: As I understood the question of necessity of production, it was settled last June at the time it was raised in the course of offering those documents. At that time your Honor ruled that it was not necessary to produce the author. The proof you would require was proof that it came from the company's files, and proof as to who these people were who wrote and received them, and that is the proof we made.

Mr. Rogers: I don't recall any general ruling.

Mr. Wright: The ruling, I think, is on page 305 of the transcript.

The Court: That might depend upon just what it was.

Mr. McClennen: Reference to your Honor's rulings are noted—objections to which your Honor is referring begin

in the record at page 3285, and on page 3286 there is a reference to the action of the Court before, and it does not militate against any of the objections made at this time. [fol. 3427] Your Honor, at an early stage in the case was careful repeatedly to say that these various things, both the oral and the written, were received only subject to being connected up with the defendants. Now, we are approaching the end of the plaintiff's case. No such connection with the defendants has been made, and there is nothing to be admitted further on an expectation of something to come in the course of the plaintiff's case. I submit that the position which your Honor took at that time in no way affects the action which the Court should now take on the objections that are now made, and they rest upon their own intrinsic soundness, and the places in the brief or memorandum on this question of admissibility of evidence are referred to on page 3287 and 3288 of the record by specific reference to the pages of the printed memorandum where those authorities occur.

The Court: The plaintiff's, do you mean?

Mr. McClennen: No, if I said "plaintiff's" I am sorry. I meant defendants' memorandum of authorities.

[fol. 3428] The Court: I wish you would just submit anything you want to, because there is a question in my mind as to whether the action the Court has taken meets the situation now, or whether it does not. There is a specific situation presented rather than a general proposition. Perhaps the broad question is whether the proposition refers to all the files of one of the co-conspirators rather than to these matters in question. That is the broad question here.

Mr. McClennen: Of course, our fundamental contention with respect to that is that the evidence has shown no conspirator in respect to any of the matters to which these inter-office memoranda refer, and no conspiracy has been shown that would carry within its scope any of the things that are presented in these inter-office memoranda and make them in any wise binding upon the defendants.

The Court: If we assume for the purpose of the argument that there is certain proof of a conspiracy, then what do you say as to the admissibility of these inter-company communications?

[fol. 3429] Mr. McClennen: I should submit if we went so far as to say that, we would be making a mistake, that the evidence does not warrant it.

The Court: I am only saying, assuming there is some evidence from which the Court might find that there was a conspiracy between these major companies and the defendant, still it would be questionable whether it would be competent to show communications between some manager or some branch manager with the major companies.

Mr. McClennen: I respectfully submit that the only basis on which an assumption by the Court could be made would be the evidence that has been presented, and that there cannot be pointed out any evidence which would warrant such an assumption. At this stage of the case there is no occasion to make any assumption at all. The time has arrived when the evidence has to speak on this question so that we do not have to deal with how we would deal with these papers if we made an assumption.

The Court: No, no, assuming I found there was evidence of a conspiracy, then we come to the question—even then we [fol. 3430] come to the question of the admissibility of these letters, these communications.

Mr. McClennen: If your Honor please, I was dealing only with the first question that your Honor put to me, that is, the question of conspiracy. I can make my language no more impressive to your Honor than by reading to your Honor what the Supreme Court has said, and I quote from Glasser vs. the United States, 315 United States 60, a very recent decision, never brought to your Honor's attention by the parties in this case until this memorandum of authority was handed to your Honor on September 25th, 1944. In that the Court says, and I am reading from page 8 of the memorandum: "Declarations are admissible over the objection of an alleged co-conspirator who was not present when they were made only if there is proof aliaunde that he is connected with the conspiracy. Otherwise, hearsay would lift itself by its own boot straps to the level of competent evidence." That picturesque illustration that the Court [fol. 3431] itself has used is by way of warning that these statements should not be received, and then from them infer a conspiracy. It must be shown in some other way. This case is out of the ordinary class of cases where we had some conspirators joined, so that—let me illustrate without meaning anything by the particular name—the United Artists, we will say, is joined as a conspirator, a defendant conspirator. Then the statement made by the duly authorized agent of United Artists is admissible according to the

ordinary principles of evidence against United Artists. It is not admissible against Schines until there has been shown actual conspiracy between Schine and the United Artists. In the case that we are now trying, United Artists is not a party defendant and, therefore, even if the statement was one authorized by United Artists, it is not admissible at all against the defendants in this case and is, therefore, not admissible in this case before it has been shown that there was a conspiracy between that company and the defend-
[fol. 3432] ants, and that the scope of that conspiracy was of such a nature that this was an authorized act done in the course of the conspiracy. Now, as I have said, I am laboring in my own words, but I know nothing more impressive with this Court than the language of the Supreme Court of the United States directly on this point. Before we could deal with these various inter-office communications, it would be necessary to arrive at a conclusion as to each particular one of those distributors whose inter-office communications is offered, and determine whether that particular distributor had conspired with the defendants. It cannot be dealt with in a group.

[fol. 3433] When we get by this question of the conspiracy then we have these other objections, many of which were not present, the ground for them not present, in the particular evidence that was presented at the time when these general objections were discussed. Now here is a piece of paper that has the typewritten name of a branch manager. There is nothing to show that he ever uttered it, nothing to show that he ever signed it, nothing to show that he dictated it and in some instances right in the documents themselves indications of error in the statement contained in the document. We could not, on the present evidence, charge that man with that paper. We don't know if it, for instance, was from, we will say, the Albany branch office. We don't know that it ever went out of the Albany branch office. These papers were collected by the distributor to present here as what they found in their files in the home office—in the branch office. We don't know whether that paper ever left the hands of the man whose typed name
[fol. 3434] appears at the bottom of it or was ever seen by him after it was typed.

Now, this is not a matter of dealing with an impossible situation for proof because if it is desired to show that that man said those things then he can be called by the plaintiff

as a witness, then the objections will still exist that the mere fact that he put them on paper, if he did put them on paper, does not make them any more admissible than they would be intrinsically because he testified to those facts, but then the witness would be present and his recollection could be improved by showing some of the other papers of the time and we could then determine in the ordinary course in which an issue is determined, by evidence of witnesses whom we have an opportunity to examine, whether his statement is correct or not.

Now, again, we find by comparisons in other negotiations in this case differences between the communication that was sent and the carbon copy, even, or the subsequently [fol. 3435] made copy which render into importance the rule that it is the original and not the copy that should be produced, if anything is to be produced. Of course, I am not speaking here about the matter of photostats. It was, of course, the understanding that photostats should have the place of the thing photostated and they do not lift the thing photostated into any higher plane. A photostat of a copy should not be introduced until the original has been accounted for. No paper should be introduced until it is shown that it was, in fact, signed, or at least sanctioned, by the person purporting to sign it. It should not be introduced until it has been shown he transmitted it. So that, even if we get by this question of these being transactions wholly apart from the defendants, these papers, we respectfully submit, are not admissible in evidence and they are not in any wise covered by the decision that your Honor made with respect to a particular [fol. 3436] paper that was under consideration by your Honor last May or June when some papers were admitted expressly subject to their being connected up with the defendants. Some of these papers are not within the authority that has been shown of the purported signer of them, that is, authority from his own company. The result is simply to put in hearsay testimony. The fact of the communication is of no value whatever in arriving at a result in this case. Of course it was said before that they were not offered as evidence of the truth of the statements made in the papers, but that decision has not stood in the way of subsequent reference to those papers as if they were evidence of the truth of the matters stated in them and it is almost impossible for the most learned and careful Judges to avoid

getting into mind the idea that the facts stated in a piece of paper that way or the statement contained in a piece of paper of that kind is a statement of a fact which he should [fol. 3437] treat as a fact and it violates the fundamental principles and men's rights ought not to be determined on hearsay testimony, and particularly when the witness is available to be called by the plaintiff and subjected to cross-examination to test the accuracy of the statement made.

I urge upon your Honor that what occurred last May and June in no manner stands against the recognition of the correctness of the objections now presented and that with the complete consistency with the position which the Court took at that time the Court may deal with these objections on their intrinsic merits and I urge that every one of the nineteen objections is sound. Of course, one of those objections may not apply to this paper and another may not apply to that paper, but that each one of them is sound and deserving of the support of your Honor as an able, considerate Judge, dealing with a very important question in this case.

[fol. 3438] Mr. Wright: If the Court please, as Counsel has advanced the rule of evidence that I think proves all together too much for his purposes; now, in making a case, in proving a conspiracy or combination between the Schine defendants and these distributors for the purpose of eliminating or restraining competition of Schine's independent competitors, we offer proof of three kinds, or, rather, four. We show what was done, what the dealings of these independents were with the distributors, what the dealings of Schine were with the same distributors, and what the dealings of the independents were with Schine. Now, in so far as this testimony of what transpired between the exhibitors and the distributors, that is always necessarily entirely hearsay in so far as the Schine defendants are concerned. There is no more reason for rejecting one of these inter-office memoranda, that are taken from the distributors' files, on the ground that the man who wrote it is not here to be cross-examined than there is for re-[fol. 3439] fusing to permit an independent exhibitor to testify to a conversation that he had with that manager on the ground that the manager is not here to be cross-examined.

Now, in proving any course of business testimony will

always necessarily consist of both of the conversations that the exhibitors had with these people, oral negotiations, and it will also consist of contracts made between them, and it will also consist of whatever the company's records may show with respect to those negotiations and those contracts and, in making that proof, for our purposes most of what Counsel has said as to whether or not a particular letter was sent from the branch to the home office, or vice versa, or whether or not the facts in the memoranda may be contradicted by some other facts goes solely to one question and that is the weight to be given to the particular document. In so far as its admissibility is concerned, it is always admissible to show that the company records [fol. 3440] contain that particular memoranda or document. There can't be any question about that, and to the extent that the presence of the document in the Company's file is material or relevant to any of the issues in the suit, clearly the evidence that has been offered here is the best evidence obtainable on that particular fact.

Now, at the time Counsel has said that, with reference to some of these memoranda, we have stated that we were only interested in showing that the Company did have whatever knowledge was reflected in the memoranda which came out of its files, I think in other cases we have asserted that the document itself was also—tended to prove the facts that were stated therein—but in each case that question is a matter of the weight or the scope of the probative value that is to be given to the document. It does not go to the question of admissibility. It is always admissible for the limited purpose of showing that it was there. This [fol. 3441] first came up in testimony. The ruling I was referring to as having been made last June appears in the transcript for June 1st. At that time we offered an exhibit identified as P-13, which was a memorandum from Mr. Dillard of the Loew Company, and we attempted to identify it through Mr. Caskey and we were unable to do so sufficiently to satisfy your Honor. We offered the letter at page 300.

"I am offering this letter which has been marked as P-13 for identification."

Your Honor said, "I will receive it but I am going to strike it out unless it is further connected up."

And Mr. Rogers said, "And subject to my objection?"

The Court said: "Yes. It is only a photostatic copy, is it not?"

"Mr. Wright: Yes. I take it there is no objection from the fact that it is a photostat? Is that correct?

"Mr. Rogers: That is correct."

"The Court: What exhibit is that?"

[fol. 3442] "Mr. Wright: That is P-13. The date is April 7, 1938. It is a letter from Mr. Tyree Dillard, Jr., at the home office of the Loew Company, to the Cleveland Branch Manager, F. D. Drew. It reads (reading letter).

"Mr. McKay: Is that letter offered to show that the second run licensee was in fact changed?

"Mr. Wright: Yes, it is.

Mr. McKay: Then it is certainly objectionable on that ground, your Honor. It cannot be offered as proof of the facts stated in the letter, depriving us of our right of cross examination either of Mr. Drew or Mr. Dillard.

"The Court: The theory on which it would be admitted without the production of the individual writer would be that it appears as part of the records of the company, that they were taken from the records of the company.

"Mr. McKay: It is hearsay as it now appears.

"The Court: I said unless it is connected up as being [fol. 3443] part of the records of the company it will be excluded.

"Mr. Rogers: Your Honor, may I make this suggestion? It seems to me that a certain amount of elasticity may be in order at times, but here we have gone through the testimony of an entire witness, we have got his oral testimony, we have got documentation here, and we haven't a single scintilla of evidence by the plaintiff as to who these people are that wrote these letters, who these people are that are supposed to have made these statements. It seems to me that the plaintiff owes to this Court a more careful degree of preparation than that in the trial of a case. I think they might have devoted a day or devoted two days before bringing the witnesses on to having some accredited representatives of these producers appear and place these documents before the Court, and have these persons identified and have their authority identified, so that we would know just how far these people are authorized to act and what they are doing [fol. 3444] here. We have got a tremendous mass of unconnected documents, unconnected testimony, all hanging by a slender thread. When it comes to making motions to

strike those motions are going to take a lot of the time of this Court.

"The Court: I have already passed on those questions. I presume that perhaps they would have some knowledge of the relationship of some of these parties named in these letters. I do not think an objection should be made from a captious standpoint. My view of the matter is that when the company is charged as a conspirator the records are competent as proof when the records are properly identified as company records. As I pointed out, in my view, several times their relation is the same as though they were a party to the action. There is a charge here that there is a conspiracy and if they are conspirators their records relating to these transactions directed to show a conspiracy, if they are properly identified, are competent. I do not [fol. 3445] think Counsel should make captious objections if there is no disagreement about the position that these gentlemen held. On the other hand, Counsel has the right to object and hold the plaintiff to its proof, and that is the proof by an officer of the company who knows that these are a part of the records of that company. It is the simplest thing in the world for an office man or a general manager to come here and testify that these are records taken from that office.

"Mr. Rogers: But the graver part is this tremendous mass of factual matter contained in these letters, which I think we are entitled to have evidence on.

"The Court: The Court will direct him to be here at any time you want them to examine on these letters.

"Mr. Rogers: It is more than merely directing him to be here to examine him on these letters. I think it is rather if the plaintiff is introducing these letters as evidence of the factual matter contained in these letters then we are [fol. 3446] entitled to have the evidence of witnesses as to these factual matters and not merely a declaration in a letter.

"The Court: I disagree with you on that. As I said before, if they are letters shown to have been kept in the regular course of business by one of these companies, and then they are identified as being part of that record, they are competent here. I mean by that you have not got to call one of these gentlemen here to testify that he wrote this letter and so-and-so received it. It is received because they are a part of the records."

The Court: The point of that discussion, first, is that to receive the document and then I don't know—permitting them, any records of the company, if it is claimed it is one of the co-conspirators who wrote some letter it is evidence in itself of conspiracy, as an admission against himself, wouldn't it?

Mr. Wright: Yes.

The Court: But I don't know. The broad question here is whether you can support all the records of the company. [fol. 3447] The backbone of that, of course, is, one point is, Mr. McClennen's point raised about the conspiracy, including the proof of these matters that are written about in these identified exhibits. Now, even the letters themselves being some evidence of a conspiracy, I don't know. I mean, the exhibits may be some proof of conspiracy or—I am not saying that they do, but they might. I don't believe they should be excluded because they are made a part of the account which goes to show there was a conspiracy, but I will look over this.

Mr. Wright: I would like to read the rest of page 305. I read, I believe, Mr. Rogers' or the Court's statement: "It is received because they are a part of the records."

Then Mr. Rogers said: "I will go as far as that, your Honor, but I do not go the rest of the way. That is where this writer of the letter attempts to set forth factually a state of facts which your Honor is going to take as testimony of [fol. 3448] the fact I think we ought to get evidence on those factual matters and we are entitled to evidence on those factual matters and to cross-examination.

"The Court: The question of connection, of course, is to be raised at the end of the trial.

"Mr. Rogers: And that is their duty in spelling out their case. He must get the witness on the stand and prove his facts by the witness.

"The Court: No, I do not agree with that statement."

In reliance on what was said at that time, I don't recall, we did not attempt to make further proof of the kind suggested until the witnesses were brought here to identify the documents and identify the writers and receivers, and I think on the basis of Mr. Rogers' objection at that time it was clear that all they were then concerned with, as far as cross examination goes, was a matter of sight, admittedly there was always evidence of the fact that the company had in its files the document and whatever information was

in the document. but the objection was limited there to the [fol. 3449] insistence that if the document was going to be treated as anything more than that it was going to be treated as evidence of the fact that some one, and only that some one, the writer of the document, must be called and put on the stand.

The Court: Let me ask you, how do you give any force to the document itself unless you see some evidence of the fact contained in it?

Mr. Wright: In many cases the document will refer to facts proved by independent evidence. All that the document will show is simply that those facts were brought to the attention of the company, or were written to the company at the time.

[fol. 3450] The Court: How about other facts that are not disclosed?

Mr. Wright: As to those, I suppose it is a question of whether or not the fact is one which would normally be made to appear by evidence such as is recorded in the document. If it is, I suppose it would be accepted as evidence of that fact. If it is not, I suppose then the Court might require further proof as to what the facts were, but in any event, that question is a question of weight and not admissibility. The document would still be admissible to show——

The Court: It may be admissible for one purpose and not for another.

Mr. Wright: That is quite conceivable.

The Court: If it is your position that these documents are receivable for the specific purpose of showing the relation of the officials, one from the other, that is one thing. Of course, if they are offered as evidence of the statements contained in them wholly apart from any question of direct proof being given as to some of the contents, that is another question.

[fol. 3451] Mr. Wright: They are clearly evidence of the fact that the officials whose names appeared thereon did prepare those documents and placed them in the Company's files on or about the dates they bear.

The Court: I am speaking of the contents of the documents, outside of the question of the proof of the capacity of an individual. It does appear—some of these articles are not signed at all. Some of these letters are not signed. They are referred to at the top as made by somebody

through somebody else. We have the broad question, it seems to me, of whether all the records of the Company, those charged with conspiring with the defendants, which relate to the question of the acts between the company and the major companies is competent. That is the particular question.

Mr. Wright: I submit, your Honor, communications are clearly competent to show those communications were written, that they occur.

The Court: You have to go further than that. Irrespective of that, you speak about the communications written. [fol. 3452] You distinguish the fact they were written from the fact of their contents.

Mr. Wright: No, I don't think it makes any difference as far as we are concerned whether somebody signed these communications or whether it says "From so and so to so and so" at the top. If it did, that would be another matter, but all we offer them for is what they appear to be on their face.

The Court: That is quite another question. That is the question here. If you offer the exhibits for the purpose of showing the relation of a branch manager or some official of a company as bearing on his authority to act in that capacity, that is one thing, but if they are offered as proof of the facts stated, that is another thing.

Mr. Wright: They are offered to show what he did, in any event, that the branch manager communicated the facts stated therein to whoever it appears they were communicated to, and vice versa. One thing more as to these letters. Some of these letters are letters passing between Schine and the distributors.

The Court: I am not speaking about those. I have not [fol. 3453] come to those.

Mr. Wright: I don't think you can generalize——

The Court: I am not trying to do that. That is true. That might stand on a different basis, of course. They might be connected with others, that is true, but I haven't got that far in the examination of these exhibits. There are so many exhibits I don't just recall what was said about that when they were identified.

Mr. Wright: As to the production of originals, wherever there is a copy of a letter to Schine we have served Schine with a notice to produce.

The Court: You do in your objection raise some question about the copies, although you say it does not make any difference. You apply that to photostatic copies.

Mr. McClennen: These contentions we have just been submitting are primarily dealing with this subject of what purports to be an inter-office communication, and we have not in this present argument—we can deal with that when the particular paper is presented. We have not been dealing [fol. 3454] with a communication from or to the defendants. I would like before this subject is left for the present to deal with three things stated by Mr. Wright in the course of the argument. He has read you what occurred with reference to a communication from Mr. Tyree Dillard and the remarks for the defendants with reference to that communication were in our dealing with that communication. We were not dealing with formalities. We were dealing with substances. Everybody knew who Mr. Tyree Dillard was, and there was convincing evidence that that was a letter from him to somebody else, so that none of those questions were involved there. Here we are dealing with an entirely difference situation, and the remarks applicable to Mr. Dillard's letter are not the remarks applicable to the inter-office communications, so-called, that are under consideration here.

The Court: You mean because he was identified as such an official?

Mr. McClennen: I mean because there was convincing evidence there that Mr. Dillard wrote that letter and that [fol. 3455] it was sent and that he was what he was with reference to that company. Now, that was the subject matter that was being discussed, and not the subject matter that is presented by these present communications.

Now, the other two things that I would respectfully ask your Honor's further consideration of are the two statements made by Mr. Wright that these are inter-office communications of a company charged with conspiracy. The only person charged with conspiracy here is the defendants. The defendants are charged with conspiring, if you please, with United Artists, but United Artists are not charged. The charge against them was dismissed.

The Court: I don't think that alters the situation. It is an act of a co-conspirator, whether he is charged in the suit or not. It is a question of what they did.

Mr. McClennen: It affects, if your Honor please, the propriety of asserting an argument in this case that United Artists is charged with conspiracy. I urge upon your Honor that United Artists is not charged with conspiracy.

[fol. 3456] The Court: I don't think it makes any difference so far as accepting the evidence is concerned, whether he is charged or whether he is not, if he did conspire. That is the question.

Mr. McClennen: If your Honor please, I was not dealing with the ultimate question. I was bringing back to your Honor's attention that the statement that United Artists is charged with a conspiracy is contrary to the record, because the charge against the United Artists has been withdrawn and they are not charged. We are charged with conspiring with them, which is a fundamental difference, I respectfully submit, as to the introduction of evidence, because if United Artists was charged then a properly proved admission of United Artists would be admissible in this case against United Artists, but it would not be admissible against the defendants until the connection had been made with the defendants, and, at least, if your Honor please, we can progress to a sound solution of these questions if [fol. 3457] the arguments are accurately presented as to the facts. I urge upon your Honor that the suggestion that United Artists is charged as a conspirator in this case is not so. They are not charged. Schines are charged with conspiring with United Artists. The Government abandoned the charge against United Artists and voluntarily dismissed the suit as to United Artists. I picked one name as illustrative of the entire situation.

The other thing is this: It was seriously argued to your Honor that presenting this piece of paper coming from the file of the company containing an assertion that somebody else said something was the same as calling these outsiders to the stand to testify that somebody said something to that outsider. Well, we can't cross-examine that piece of paper. We have had some of these outsiders, and before they got through with their testimony, it has been demonstrated from their own lips, the falsity of the statement in direct-examination as to what was said and done. Now, we cannot conduct a cross-examination of a piece of paper, [fol. 3458] and the distinction is as wide as the difference between a court of justice and an Indian powwow.

The Court: These witnesses are waiting, I assume. I think I will have to take this matter up later. I did not think we would go into the matter at length this morning, but we have witnesses here, and I think we better proceed.

MICHEAL BOUMANSOUR resumed the stand by and on behalf of the Plaintiff, having been previously sworn, was examined and testified as follows:

Mr. McClennen: I have no further questions.

Redirect examination.

By Mr. Wright:

Q. This Exhibit D-133 was a copy of the letter that you wrote to the Department on that date?

A. It must be.

Mr. Wright: I will ask to have this marked for identification with the next plaintiff's Exhibit number.

[fol. 3459] Mr. McClennen: For identification?

Mr. Wright: Yes.

(Thereupon letter sent by Witness Boumansour to the Department of Justice, was marked as Plaintiff's Exhibit 859 for identification.)

Mr. Wright: I will ask to have this marked for identification, and this.

(Thereupon copies of two letters addessed to Witness Boumansour by the Department of Justice, were marked as Plaintiff's Exhibits Nos. 860 and 861 for identification.)

Mr. McClennen: These are all for identification.

By Mr. Wright:

Q. This document, plaintiff's exhibit 859 for identification, is that your signature on there?

A. Yes, sir.

Q. That is the original of which Defendants' Exhibit D-133 is a copy?

A. Just alike.

Q. I will show you this letter addressed to you, or a copy of a letter addressed to you, which has been marked as Plaintiff's Exhibit 860 for identification, and ask you if you received that shortly after that date on there, March 4th, 1941? Did you receive the original?

[fol. 3460] A. I received the original.

Q. Did you also receive the original of this Exhibit 861 shortly after February 8th, 1941?

A. Yes, I did receive this.

Q. Then, at the time you received these exhibit- 860 and 861, you were then managing the Malone Theatre for Schine, were you?

A. I believe—not this one here, because on February 8th, I was still operating my own theatre.

Q. At the time you got the letter of February 8th, Plaintiff's Exhibit 861 for identification, you were still operating the Plaza?

A. Yes, sir.

Q. Although you had then signed the agreement to lease it to the Schine?

A. Yes, I signed the agreement just about a few weeks ahead.

Q. Then when you got Exhibit 860 in March, were you then managing the Malone Theatre for Schine?

A. Yes, sir.

Q. When you got that letter, do you remember what you did with it?

A. I don't remember.

Q. Do you remember whether you showed it to any one connected with the Schine organization?

A. I don't think so.

[fol. 3461] Q. Then, when this letter marked Exhibit 859 for identification was written, did you prepare that yourself?

A. I couldn't tell. I don't remember.

Q. Do you remember whether you made the copy here marked Exhibit D-133 at the time the original Exhibit 859 was sent?

A. I never remember making this letter, but I know it is my signature

Q When you say "this letter" you are referring to the copy marked Defendants' Exhibit D-133?

A. I am sure I have signed this letter.

Q. By "this letter" you are there referring to Exhibit 859 for identification?

A. Yes. I have surely signed this letter, because it is my signature, but——

Q. At the time you sent that letter, did you have any discusssion about the letter with any respresentative of the Schine Company?

A. No.

Q. When was it that you signed this copy, Defendants' Exhibit D-133?

A. I don't remember at all.

Q. Do you remember what was done with this Defendants' Exhibit D-133 after you signed it, who, if anyone, you gave it to?

[fol. 3462] A. I don't recall at all both of these letters, but I know sure that they are my signature.

Q. You don't know what, if any, discussion you had with anybody in the Schine organization with reference——

A. Oh no, I am sure of that. There is nothing connected as far as Schine handing me any document of this kind to sign. I am sure of that.

Q. You are sure you signed this copy?

A. I signed this paper.

Q. What did you do with the copy after you signed it? Did you keep it in your own files?

A. I surely don't know.

Q. What did you do with your files at the theatre there when you left, did you take them with you, or did you turn them over to Schine?

A. No, they are still over there in my office.

Q. Your correspondence file?

A. Yes.

Q. Were all left with Schine——

A. No, no, I have my own office in the theatre, at the Plaza Theatre, on the second floor. My offices remain where it is.

Q. This Exhibit D-133, did that come out of your files?

A. I told you really the truth, I never remember seeing this paper.

[fol. 3463] Q. You mean prior to the time it was shown to you yesterday?

A. Yes, but in another way, it is surely, it is my signature.

Q. You don't remember when you signed it or what you did with it after you signed it?

A. No, this letter, I usually write with my head letter.

Mr. McClennen: What is the witness referring to by identification number now?

The Witness: 859.

Mr. Wright: We will offer in evidence Plaintiff's Exhibits 860 and 861.

Mr. McClennen: These came from your files, Mr. Wright, did they?

Mr. Wright: That is right.

Mr. McClennen: Exhibit 859 also came from your files?

Mr. Wright: Yes, we will also offer 859.

Mr. McClennen: No objection.

(Thereupon Plaintiff's Exhibits Nos. 859, 860 and 861, previously marked for identification, were received in evidence.)

Mr. Wright: Exhibit 861 is a letter dated February 8th, 1941, to Mr. Boumansour signed "Thurman Arnold", entitled "U. S. against Schine."

[fol. 3464] "Dear Sir: We are proceeding with our preparation for trial in the above-entitled case, and it is expected that a trial date will be set in the near future. We are, therefore, interested in learning whether anything has happened in the Malone situation since Mr. Terrell of the Department saw you during the latter part of July, 1941, which you think may be of interest to us in the prosecution of this case. What further negotiations, if any, have you had in regard to leasing your theatre to Schine? Have you been able to secure any first-run product for exhibition during the current motion picture season? What second-run product are you exhibiting during this season? Very truly yours."

Exhibit 860 is a letter dated March 4th, 1941, addressed to Mr. Boumansour, at the Plaza Theatre, Malone.

The Court: Mr. who?

Mr. Wright: Mr. Boumansour, Mr. Michael Boumansour, the witness.

The Court: Oh, yes. I thought you were speaking about [fol. 3465] a reply.

Mr. Wright: "Plaza Theatre, Malone, New York, re U. S. against Schine. Dear Sir; We have not received a reply to our letter of February 8th, 1941, copy of which is enclosed for your information. Very truly yours, Thurman Arnold."

Exhibit 859 is the original letter which is addressed to the Department of Justice, Washington, D. C., re U. S. against Schine. "Gentlemen: This is to advise that I have succeeded in disposing of my theatre as planned. I have no further complaints. Everything is satisfactory. Very truly yours, Michael Boumansour."

By Mr. Wright:

Q. You had informed Mr. Terrell of the Department, had you, in July, 1940, with respect to the negotiations with Schine then in progress?

A. I think I did. Nothing sure. I think I did.

Mr. Wright: I will ask to have this affidavit and two letters that are attached marked with the next exhibit number for identification.

(Thereupon affidavit with two letters attached, were marked as Plaintiff's Exhibit 862 for identification.)

[fol. 3466] Q. The first page of his Exhibit 862, do you recognize that as a copy of a letter you received shortly after October 30, 1939?

A. Yes.

Q. And the second page is that your signature on that letter?

A. Yes.

Q. October, 25th, 1939?

A. Yes, sir.

Q. You wrote that on or about that date?

A. Yes.

Q. And the document attached there headed "Affidavit" was that sent with the letter to which it is attached?

A. I don't believe so. This document——

Q. Read the letter.

A. Yes, that went together with the letter.

Q. Is that your signature on the affidavit?

A. Yes, sir.

Q. That was made on or about the day it bears?

A. 24th day of August, 1939.

Q. Made at Malone?
A. Yes.
Q. Were you shown that affidavit before you testified?
A. Yes.
Q. You read it?
[fol. 3467] A. Yes, sir.
Q. That affidavit set forth the facts, did it, as you recalled them at that time?
A. As I recalled them.
Q. About your dealings with Schine and the distributors?
A. Yes, sir.
Q. I call your attention to page 7, and do you see anything there with reference to the letter to the Department of Justice?
A. Yes, sir.
Q. And the date of the letter appears there, does it not?
A. June 30th, 1937.
Q. June 30, 1937?
A. Yes, sir.

Mr. Wright: Have you that Warner contract that was in evidence, I think it is Exhibit 132?

Mr. McClennen: I think you mean for identification D-134.

Mr. Wright: Yes, I do mean this, D-134. I thought that had been offered. We will offer it in evidence.

Mr. McClennen: That was for identification.

Mr. Wright: We are offering it now.

(Thereupon Warner contract previously marked Defendants' Exhibit D-134 for identification was thereupon received in evidence and marked as Plaintiff's Exhibit 863 in evidence.)

[fol. 3468] Q. I hand you this document, which is marked in evidence as Plaintiff's Exhibit 863, and which was shown you on cross-examination. I believe you testified at that time that that is a contract you signed on or about the typewritten date there, June 14, 1937, is that right?
A. I know I have signed it, but I don't remember what date I signed it.
Q. Do you remember when you got an approved copy of that contract, if at all?
A. I must have had a copy of it but I can't recall now.
Q. I mean an approved copy. Did you ever get a copy

of it? That is, get your application back with the approval of the Company noted on it?

A. I can't recall that.

Q. What was done with your contract records at the time you turned the theatre over to Schine?

A. Well, all the contracts that were in force of that same year they were still on—I still had on record, if I had to play myself I turned it over to Schine.

Q. How about the others, the older contracts, what if anything was done with those?

A. Like a copy of this?

Q. Yes, an approved copy of that.

A. I don't know. They must still be on file somewhere [fol. 3469] in my office.

Q. Did you bring any of those contracts down here with you?

A. No.

Q. Before you testified did you have an opportunity—did you make an examination of any contracts?

A. No.

Q. In making the contracts you did make the typewritten date as ordinarily the date of the application?

A. Really, I can't remember.

Q. What was the ordinary course of business in making the contracts you made, or that you testified to, for second-run pictures? Did you first make an application?

A. Yes.

Q. Sign an application?

A. Yes.

Q. Then a typewritten date would be put in at that time?

A. Well, in cases, but in this particular case that was not the way it was done, this particular contract.

Q. Of course, on your ordinary contracts you signed an application?

A. Signed an application.

Q. Typewritten date would be put in there at the time you signed the application, is that right?

A. Yes.

Q. Later you would receive an approved copy of the [fol. 3470] application?

A. Of the application.

Q. Is that right?

A. Yes.

Q. Do you have any recollection what happened with respect to this particular contract, Exhibit 863?

A. I never signed any other copy of this contract before. I mean just the original, that is all.

Q. That was the copy you signed?

A. That contract was written as it is, as it stands right there, and I came over to the Albany office and I signed it right there without looking any more.

Q. Do you remember whether you got an approved contract at a later date or whether you took the contract with you then?

A. No, I didn't take any contract with me at that time.

Q. You weren't given any approved contract then?

A. Not at that time.

Q. Do you have any recollection as to when you got an approved contract?

A. I can't recall that.

Q. I show you this Exhibit 857 for identification and I call your attention to the fourth paragraph and ask you if that refreshes your recollection as to whether or not at the time you wrote that letter of June 30th you had received [fol. 3471] an approved contract like this Plaintiff's Exhibit 863?

A. I am quite positively sure that when I wrote this letter there was no contract signed with the Warner Bros.

Q. You mean signed by whom?

A. I mean that due to the fact that I wrote this letter of June 30th it is because I was entirely out of——

Mr. McClennen: May that last be stricken out?

The Court: Just answer the question.

(Last question read.)

A. This letter, dictated by me and signed by my assistant.

By Mr. Wright:

Q. I was referring to the contract. Your statement relating to the contract, you mean it was not signed by you or was not signed by the company?

A. That is my signature right there.

Q. I understood you to say at the time you wrote the letter of June 30th you didn't think this contract, Plaintiff's Exhibit 863, had been signed, and I was trying to find out

whether you meant by that your signature or the signature of the sales manager?

A. This is my signature right there on the contract.

Q. That had been signed, is that right?

A. Yes.

Q. But you had not received a copy signed by Mr. Sears, [fol. 3472] is that right?

A. Not at that time.

Q. June 30th?

A. No.

Q. With reference to the time that you bought other second-run products, was that before or after June 30th?

A. After.

Q. And the dates on which you made those other contracts and the season's pictures you bought would appear on the face of the contracts?

A. Mostly.

Q. I noticed this contract here that is marked as 863 calls for the pictures of—can you tell me by looking at it which season that covers?

A. I can't see anything.

Q. Maybe I can find it.

The Court: Isn't it on the back?

By Mr. Wright:

Q. I call your attention to what appears on the back there.

A. Season 1936-37.

Q. These second-run pictures you bought on this contract, Exhibit 863, in June, 1937, do you know about how many of those had already been released and played in the Schine houses, first-run?

A. Of these here?

[fol. 3473] Q. Yes.

A. I can't recall, but at that time they were mostly all played.

Q. The season only had a couple of months to run, isn't that right?

Mr. McClennen: That is objected to as leading. For second-run purposes it is obvious that the season had about six months to run.

The Court: The terms are variable here. There seems to be no definite time as far as I know from the record.

Mr. Wright: I think it appears from the record, and also from the contract.

The Court: Let him state what time, if he knows. He said '36-'37 season. Did you run those pictures there that are shown in that contract?

The Witness: Yes, sir.

The Court: Over what period of time did you run them?

The Witness: I usually exhibit about six to eight pictures a week so I can't recall exactly the time it would take to exhibit all these pictures.

The Court: Six or eight a week.

Q. At the time this contract was handed to you and you [fol. 3474] signed it, was anything said about second-run pictures for the '37-'38 season?

A. No.

Q. At a later time, do you recall when it was, if at all, that you got '37-'38 products second-run?

A. Oh, I did.

Q. I say, do you recall when it was?

A. Not exactly.

Q. Did you later talk to the Warner Exchange about '37-'38 pictures for second-run?

A. Well, yes, later. After most of these pictures were all played.

Q. That is, after these pictures that are on this Exhibit 863 were played?

A. Were played.

Q. And prior to that time was any offer made to you, or was anything said, about you playing '37-'38 pictures?

A. No.

Mr. McClennen: That is objected to. This has nothing to do with the cross-examination.

The Court: I don't know. We have gone over these dates here. He testified the dates in 1937. Have you gone over this, Mr. Wright. I don't know whether it has been during that time.

[fol. 3475] Mr. Wright: Well, I think we can show what else was bought and when by the contracts, when and if they were produced. They are subpoenaed. So far we have only had some of them.

The Court: Testified to the pictures he got in the fall of '37 and also various pictures from other companies:

By Mr. Wright:

Q. You recall how long it was after you made that or sent in that affidavit that is part of Exhibit 862 that George Lynch saw you? I believe you testified yesterday that you saw him in the fall of 1939?

A. Yes, sir.

Q. Was that before or after that letter of yours dated October 23rd that is attached to Exhibit 862 for identification?

A. Is this 862? Is this the letter you are referring to?

Q. No, I refer to your letter.

A. This letter right here. I can't recall. I don't know if it is before or after.

Q. Did you see him in 1940?

A. Yes, I saw him in 1940.

Q. Where did you see him then?

A. Where?

Q. Yes.

[fol. 3476] Mr. McClennen: Just a moment. That has been gone into and was left on cross-examination without any dealing with that subject.

The Court: He said on direct examination the fall of 1939, "I saw George Lynch". That is the direct examination.

Q. Now I — asking him: Did you see him at any time after you sent that affidavit in to the department?

A. Yes, sir.

Q. When was that?

A. That is when I—a few days before I closed the deal of leasing the theatre in 1940, late in 1940.

Q. Late in 1940?

A. Yes, pretty near in December, 1940.

Q. Did you at any time furnish Mr. Lynch with a copy of that affidavit?

A. Yes, but not in 1940.

The Court: What?

A. Not in the year 1940.

By Mr. Wright:

Q. When was that?

A. I don't recall now, but I know I did furnish him with a copy.

Q. Can you give us the approximate time?

A. I can't recall the time.

[fol. 3477] Q. Can you recall it with reference to the time you had this conversation about a deal for the theatre?

A. Maybe I could.

Q. Let's see if you can.

The Court: What are the dates of 81 and 82?

Mr. McClennen: 81 is February 14, 1941. 82 is January 21, 1941.

The Court: All right. That takes care of that.

The Witness: I can't recall exactly the date but I know that I did furnish him with a copy.

By Mr. Wright:

Q. Was it sometime between that first conversation you had with him and the time you made the agreement that is marked in evidence here as Exhibit 82, which is dated January, 1941?

A. It is much before this.

Q. By "this" you are referring to——

A. Much ahead of this.

Q. —Exhibit 82?

A. Yes, ahead of this.

The Court: The affidavit bears a date, doesn't it? Don't you know when you drew it and showed it to Lynch?

The Witness: I can't remember, your Honor, the time I did show it, but I know I did show it.

[fol. 3478] By Mr. Wright:

Q. Then when you showed it to Lynch did you have any conversation with him about the affidavit?

A. Yes.

Q. What was said?

Mr. McClennen: That is objected to, if your Honor please.

The Court: Overruled.

A. That is when the deal didn't go through.

The Court: He asked you what was said when you showed that to Lynch.

The Witness: What he said? At that time he took the affidavit from me and he showed it to somebody else in the office.

Q. Did he say anything to you about it?

A. Not himself.

Q. Did Mr. Myer Schine say anything to you about it?

A. Not that I recall.

Q. Well, when was this now, as nearly as you can recall?

A. It is in '39.

Q. Then what was said about the deal after you gave him the affidavit, copy of the affidavit, what was said?

A. Well, they couldn't do any deal unless I had this affidavit returned to me, the original. We couldn't make any deal unless you could withdraw the affidavit with the Department.

[fol. 3479] The Court: Who said that?

The Witness: I recall Mr. McKay.

By Mr. Wright:

Q. Where was that?

A. I can't exactly tell you the date.

Q. Can you recall the place?

A. Yes.

Q. Where?

A. In Gloversville.

Q. And then did you do anything about withdrawing the affidavit?

A. Yes.

Q. What did you do?

A. I called up Washington, called up Seymour Graber.

Mr. McClennen: Just a moment. I object to his going any further.

The Court: The point is whether he got the affidavit back, not what talk he had. Did you get the affidavit back?

The Witness: No.

Mr. Wright: I will ask you again whether you had any conversation with anybody with the Schine Company before this letter, Exhibit 859, was written to the Department?

A. I don't recall. I know——

[fol. 3480] Mr. McClennen: He should not go further.

The Court: He said he does not recall.

The Witness: I don't recall it.

Q. You don't remember whether you wrote that or dictated it or somebody else did?

A. It is my signature.

The Court: That does not answer the question. Do you recall whether you dictated it or somebody else?

The Witness: No, I don't recall.

Mr. Wright: Have you the letter from the witness to Mr. Grassgreen? I think that is No. 133?

Mr. McClennen: I think you have reference to Defendants' Exhibit 136 for identification.

By Mr. Wright:

Q. With respect to Defendants' Exhibit 136 for identification, that was referred to on cross-examination, did you get any answer to that letter other than this letter which has been marked in evidence as Exhibit 195?

A. I wrote this letter.

Q. Yes. The question was whether you got any answer to it.

A. No, never.

Q. As I understood it, you previously testified you got that Exhibit 195 shortly after that date?

A. Yes.

[fol. 3481] Q. Other than this Exhibit 195 I call your attention to the fact Exhibit 195 states: "Following up your recent letter, I regret to inform you I will not be interested in serving second-run in the city of Malone." Now, did you write any letter before that, other than this one marked for identification Exhibit 136?

A. No, I never wrote any letter before that.

Q. Or. afterward, between that date and May 21st?

A. No, that is all, as I recall.

Q. You were asked on cross-examination yesterday by Mr. McClennen: "Well, now, why didn't you kiss his hand back and forth when he made that proposition to you?" Was there any proposition made to you by Mr. Grassgreen?

A. No.

The Court: He didn't say there was a proposition. He said he would have done this.

Mr. Wright: I wanted to make it clear there wasn't any

proposition made. Mr. McClennen's question assumed there had been and I did not catch it at the time.

Mr. McClennen: Not at all. The assumption was what he said in the letter was true.

The Court: I am speaking about his oral testimony.

Mr. McClennen: Yes, but what I said about the proposi-
[fol. 3482] tion, the context showed was the proposition contained in his letter of May 6th that refers to——

The Court: He hadn't made that proposition, you mean?

Mr. McClennen: He testified that that statement was true of what he said Mr. Grassgreen had proposed to him.

Mr. Wright: I will offer the letter in evidence.

(The letter referred to, previously marked as Defendants' Exhibit 136 for identification was received in evidence and marked Plaintiff's Exhibit 864.)

The Court: Had he made him a proposition, if he had made such a proposition he would have shook his hand, and so forth.

Mr. McClennen: The course of the testimony was before I showed him this letter I asked him if Mr. Grassgreen had made such a proposition as the one stated in the letter and he said he had not.

The Court: Yes.

Mr. McClennen: That he would have kissed his hand if he had.

The Court: Yes.

Mr. McClennen: Then, if your Honor please, I showed him the letter and he then said Mr. Grassgreen did make
[fol. 3483] that statement. I was speaikng about the first conversation.

Mr. Wright: The letter is dated May 6, 1937, addressed to 20th Century-Fox Film Corporation, Film Row, Albany, N. Y., attention Mr. Grassgreen. "Dear Sir: Some time ago when in Albany I had a talk with you in regard to second-run policy. You informed me at that time that if I would buy 100 per cent product you would consider the deal and advise me immediately as to your disposition of this matter. I am now open to buy pictures as follows: 100 per cent 1937-1938 product, also shorts and news reels, 25 pictures 1936-1937 product. If this proposition is O.K. please send your representative here at his earliest possible convenience. Hoping to receive a reply by return mail I remain, Yours truly."

Q. Did Mr. Grassgreen at any time offer to sell you 100 per cent of the product, or any other part of the Fox product, for second-run?

[fol. 3484] A. If I recall, he might have approached me before I even opened up the theatre.

Q. I don't think you understood the question. I didn't ask you if you talked to him. I asked you if he made you an offer?

Mr. McClennen: I submit that statement should not be made. There isn't any report he didn't understand.

(Last question read.)

A. No, I never did.

Mr. Wright: That is all.

[fol. 3485] Recross examination.

By Mr. McClennen:

Q. That is, this statement in your letter of May 6th, 1937, in the first paragraph, Exhibit 864, is not true, is it?

A. In one way, there is a difference——

Mr. Wright: If the Court please, the first statement—the statement does not say he made an offer of pictures.

Mr. McClennen: There is nothing the matter with my question, and I think my brother must know it.

The Court: Go ahead. State whether it is true or not.

Mr. McClennen: Read the question so that he will have it clearly before him.

(Question read.)

The Witness: I can't answer that question.

Q. Well, it is true or it is not true.

A. I can't answer it.

Q. Which is it?

A. I can't answer it.

Q. You mean, don't you, that you won't answer it?

A. I can't understand the question, how this is——

Q. Let me see if I can't make it clear to you: You see this statement that you made?

[fol. 3486] A. Yes.

Q. Some time ago?

A. Yes.

Q. "When in Albany I had a talk with you in regard to second-run policy. You informed me at that time that if I would buy 100 per cent product you would consider the deal and advise me immediately as to your disposition in this matter." Did Mr. Grassgreen say to you some time before May 6th, 1937, what you stated in your letter that he said to you?

A. He may have, I don't recall. He may have, but I don't recall.

Q. Well, now, considering your disposition to be truthful, now that you see it in the letter, don't you think that he said just that to you, namely, "You informed me at that time that if I would buy a hundred per cent product you would consider the deal and advise me immediately as to your disposition in this matter"? Don't you, seeing what you said in your own letter, recall that that is just what Mr. Grassgreen said to you?

A. He may, but I don't recall.

Q. Would it be equally true for you to say he "He may not, but I don't recall"?

A. He may not, and I don't recall. I will tell you both ways.

[fol. 3487] The Court: Why would you write that in the letter if it were not so? Why would you write what Mr. Grassgreen said if it were not the fact? Can you explain a reason?

The Witness: Reason is, seven years away from today.

The Court: No, no, why would you write a letter making that statement if it were not accurate?

The Witness: He might have told me something about it, your Honor, that if I do buy a hundred per cent, but he never came through with it.

The Court: You said in this letter he had told you that. Is that true? That is the point.

The Witness: It might have been true, it might not. I don't know, your Honor.

Mr. McClennen? That is all.

The Court: We will take a recess now.

(Whereupon a recess was taken until 2 o'clock P. M.)

[fol. 3488] After recess, 2 o'clock P. M.

Appearances: As before noted.

LEON J. MCCARTHY, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. McCarthy?

A. Canandaigua.

Q. What is your occupation?

A. Newspaper man.

Q. With what paper?

A. I was formerly connected with the Daily Messenger in Canandaigua.

Q. In what capacity?

A. Editor.

Q. Were you editor of the Daily Messenger in May, 1938?

A. Yes, sir.

Q. I will show you this page marked for identification as Exhibit 806, and ask you if you recognize that as the page from that paper published on Tuesday, May 10, 1938?

A. That is right.

[fol. 3489] Q. You were the editor on that date?

A. Yes.

Q. You know Mr. William McFarland?

A. Yes.

Q. Who was he?

A. He is the manager of the Playhouse Theatre.

Q. In Canandaigua?

A. Canandaigua.

Q. Calling your attention to the statements in the second and third paragraphs of the first column there, can you tell us whether or not those statements came to you from Mr. McFarland?

A. Yes, that is true.

Mr. Wright: We will offer this exhibit 806 in evidence. The part in which we are particularly interested is the item in the left-hand top corner of the page there, on which the exhibit number appears, and I assume it may be understood that any data in the item which is not based on statements from Mr. McFarland may be disregarded for our purposes?

Mr. McClennen: This is objected to. It would be impossible to know what it is going to be claimed was attrib-

[fol. 3490] utable to Mr. McFarland. It has not appeared

in evidence what Mr. McFarland said to the witness and we make the objection that what he did say on the present showing is not admissible in evidence.

The Court: Isn't that true? There is nothing yet to show that the statements therein contained were statements made by Mr. McFarland to the witness.

Mr. Wright: (I referred to the second and third paragraphs in the exhibit, which I take it speaks for itself.

The Court: Who is the gentleman who testified with relation to that theatre?

Mr. Wright: This exhibit I believe was identified when Mr. Lauer was on the stand.

Mr. Kallis: Shall I read your Honor the relative portions——

The Court: What is the date of that?

Mr. Kallis: The date of the testimony?

The Court: Yes.

Mr. Kallis: October 11th, at page 2562, is where it really begins.

The Court: What was his name?

Mr. Kallis: Anthony J. Lauer. Mr. De Toto testified [fol. 3491] with respect to the same item last June 7th—6th or 7th.

The Court: June 6th or 7th?

Mr. Wright: This is Mr. Lauer's testimony there.

(Handing testimony to Court).

The Court: Perhaps the witness can state what conversation he had.

Mr. Wright: If the Court please, it is already—read the question and answer there.

(Question and answer read, as follows:

"Q. Calling your attention to the statements in the second and third paragraphs of the first column there, can you tell us whether or not those statements came to you from Mr. McFarland?

A. Yes, that is true.")

Mr. Wright: It appears on the face of the exhibits.

The Court: The statement came to you? You mean made to you by Mr. McFarland?

The Witness: Well, the statement, the announcement—may I see that and I will clarify that?

Mr. Wright: Surely.

(Handing exhibit to witness.)

Mr. McClennen: What Mr. McFarland said is objected to on the usual ground.

[fol. 3492] The Court: His answer was that it came to him. I was trying to find out what he meant by that.

Mr. McClennen: I am saving the major objection.

The Court: We have not come to that yet. We will pass on that later.

The Witness: The second paragraph says "Announcement was made today"——

Mr. McClennen: Just a moment.

The Court: How did it come to you, that is the point? Don't read it. Were you talking to Mr. McFarland?

The Witness: I don't recall at the moment that I talked with him or that I wrote this particular article. My best recollection is that one of the reporters handled it, although I knew at the time that it was coming subject to release later, and as the article itself states——

Mr. McClennen: Just a moment.

The Court: You can't state the contents. I will receive it. Mr. Lauer testified he read this particular article. Objection overruled.

Mr. McClennen: I again urge upon your Honor that the last statement of the witness does not even connect this [fol. 3493] with Mr. McFarland. He is not sure he talked with Mr. McFarland.

The Court: This is the newspaper which Mr. Lauer testified that he read. That is his testimony, that he read that particular column.

Mr. McClennen: He did testify to that effect when your Honor excluded for the time being, until it was connected in some way. Now it is not connected in any way. Just a reversal of your Honor's ruling on the subject.

The Court: It is connected with the publication.

Mr. McClennen: Connected with anybody connected with the defendants.

The Court: By his own testimony, he said that was published in such and such a paper.

Mr. McClennen: What was under consideration was, when your Honor excluded it, not that that was not the newspaper

and not that it did not appear in the newspaper, but that it was not attributable to the defendants in any way. That has not changed. This witness does not recall that he even talked with Mr. McFarland.

The Court: Very true. Therefore there is no evidence [fol. 3494] that Mr. McFarland ever said any of the things that appear in the newspaper.

The Court: My thought was this: Was an article written Mr. Lauer upon which he acted, or failed to act, whichever it was?

Mr. McClennen: That was the situation at the time your Honor excluded it until it is shown it was connected in any way with us, and it is not shown.

The Court: Objection overruled. Received in evidence.

(The newspaper article, previously marked as Plaintiff's Exhibit 806 for identification, was received in evidence.)

The Court: Is that all?

Mr. Wright: That is all.

Cross-examination.

By Mr. McClennen:

Q. Did you personally have any talk with Mr. McFarland prior to this issue of May 10, 1938, Plaintiff's Exhibit 806?

A. Yes, I had talked with Mr. McFarland in regard to this purchase as mentioned in that article, but I don't recall whether it was before or after, however.

[fol. 3495] Q. You don't recall whether it was before or after this article was published?

A. After that.

Q. At the time this article was published, Plaintiff's Exhibit 806, the first two paragraphs, had Mr. McFarland told you any of the things set out in the first two paragraphs, that is, before this was published?

A. As I recall it, I met Mr. McFarland one day on the street.

Q. This was before this was published?

A. Yes. There had been a rumor——

Mr. McClennen: May that be stricken out, if your Honor please?

The Court: He objects to the use of the word "rumor." You met Mr. McFarland?

The Witness: I asked Mr. McFarland if the Schine people were planning to construct a new theatre and he said "Yes," that there were some plans under way and that he expected an announcement would be made soon, and as this article shows——

Q. Never mind. Is that all he said to you?
A. Yes, in substance, that is it.
Q. That is all that occurred before this newspaper article went out?
[fol. 3496] A. As I recall it, yes.
Q. And you did not write the article?
A. I don't think I did, sir.
Q. Do you recall when the new theatre in Canandaigua was completed?
A. The new theatre?
Q. Yes. There has been a theatre built in Canandaigua since May 10, 1938?
A. Referring to the Lake Theatre?
Q. I mean the Lake Theatre.
A. Yes, I remember it was constructed. I can't give you any dates. I don't recall that.
Q. Was it soon after this article?
A. I couldn't tell you that, sir, without looking it up.

Mr. McClennen: That is all.
Mr. Wright: That is all.
Mr. McClennen: If your Honor please, merely to reserve our rights, I move that the newspaper article be stricken out.
The Court: Denied.

[fol. 3497] Robert I. Pierce a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. Pierce?
A. Ilion, New York.
Q. What is your occupation?
A. I am now in the retail shoe business.
Q. How long have you been so engaged?
A. Five years.

Q. You were formerly in the theatre business at Ilion?
A. Yes, sir.
Q. Connected with what theatre?
A. Various theatres, since 1915.
Q. All in Ilion?
A. Yes, sir.
Q. What was the name of the last one?
A. The last one was the Capitol Theatre.
Q. That was operated by what company?
A. Young & Whitney, Inc.
Q. What position did you hold with the corporation?
A. Stockholder, Secretary-Treasurer and Manager.
Q. That Capitol Theatre there was built when?
[fol. 3498] A. In 1925.
Q. By whom?
A. Yonng & Whitney, Inc.
Q. In 1925, when the Young & Whitney Company built the Capitol, what other theatres were there in Ilion?
A. The Old Ilion Opera House, Big Ben Theatre, and the Temple Theatre.
Q. Who owned those theatres?
A. The Ilion Opera House and Big Ben Theatre were owned by Young & Whitney. The Temple Theatre was owned by the United Odd Fellows Association.
Q. Then at that time was there a theatre operating in Herkimer?
A. Yes, there were two theatres, the Star Theatre and Richmond Theatre. No, at that time the new theatre, it was called the Gem, which is now the Liberty.
Q. And what other?
A. The Richmond.
Q. Do you know who operated those theatres?
A. The new theatre was operated by a company of Moyer, Gloo & Irvin. The Richmond Theatre was operated by Schultz & Letson.
Q. Where are the towns of Herkimer and Ilion, with reference to each other?
A. Herkimer is three miles east of Ilion.
[fol. 3499] Q. And where are they with reference to Utica?
A. Ilion is ten miles east of Utica. Herkimer is three miles further east.
Q. Where are the town- of Herkimer and Ilion with reference to Little Falls?

A. Herkimer is ten miles west of Little Falls and Ilion is thirteen miles west of Little Falls.

Q. When you built the Capitol Theatre, tell us what kind of theatre it was with reference to size and appointments?

A. Why, I think it was classed at that time as one of the magnificent theatres for a town of its size in the country.

Q. How big was it?

A. 1300 seats, approximately.

Q. All on one floor?

A. No, 1100 seats on the ground floor and about 200 in the balcony.

Q. And do you recall what its approximate cost was?

A. Around 300 and some thousand dollars.

Q. During the years 1925 through 1928 what sort of a picture policy was it operated on?

A. You mean in relationship to Herkimer?

Q. Well, first, with reference to the pictures.

A. That was really before there was any protection [fol. 3500] granted either way. There was open buying. We bought some ahead of Herkimer. Herkimer bought some ahead of us. There was no protection from Utica.

Q. What, if any, change occurred in 1928?

A. 1928 the Herkimer house and the Little Falls house was taken over by the Schine circuit, approximately at that time.

[fol. 3501] Q. Then they operated the houses in Herkimer and Little Falls how long, if you remember?

A. They operated until Fox took them over. I think it was 1934. Now, I am not positive of that date.

Q. You continued to operate the Capitol Theatre at Ilion during the same period until Fox——

A. Yes, sir.

Q. —took that theatre over, too?

A. Yes, sir.

Q. Do you recall that year might have been 1930?

The Court: You said "theatre, too." What theatre are you referring to, taken over by Fox, the one in Herkimer?

Mr. Wright: All three.

The Witness: Those dates are quite hazy. It might have been 1930 or 1931. It was along in there.

The Court: What did they take over then?

The Witness: The Fox theatres took over Herkimer, Ilion and Little Falls.

The Court: You said Schine took them over first and then Fox?

The Witness: Yes, I think Schine took them in 1928.

By Mr. Wright:

Q. Then during the period that Schine was operating in Herkimer and Little Falls, when you were operating in [fol. 3502] Ilion——

Mr. McClennen: You are now going to what period, the 1928 period?

Mr. Wright: The question I asked him, I think, speaks for itself. Read the question.

(Last question read.)

Mr. McClennen: It appears there was more than one such period.

Q. With specific reference to 1928 through 1930, or whenever the deal with Fox was made. During that time, when did you play pictures at Ilion, with reference to when they played in Herkimer and Little Falls?

A. Put that question again, please.

(Question read.)

A. Behind Herkimer.

Q. And Little Falls?

A. Yes, sir.

Q. Then you took your Capitol back from the Fox Company, did you?

A. Yes, sir.

Q. Do you remember about when that was?

A. They operated it two years. They operated approximately two years. I couldn't give you the definite date——

Q. When you got it back?

A. Two years from the time——

[fol. 3503] Mr. Rogers: A little louder.

The Witness: We took it back approximately two years. I think they operated it close to two years.

Q. By "they" you are referring to Fox Metropolitan?

A. Fox Metropolitan Theatres, that is right.

Q. That would be in 1932 or 1933 that you got it back?

A. January, whatever year it was.

Q. Then do you know whether or not Schine resumed operation of the houses at Herkimer and Little Falls?

A. It was some short time afterwards. I think we got possession of our house ahead of Mr. Schine. I think it was several months.

Mr. Wright: I will ask to have these contracts marked with the next Plaintiff's Exhibit numbers for identification.

Mr. McClennen: Are those for identification only?

Mr. Wright: These are being marked for identification.

(Thereupon six contracts referred to were marked as Plaintiff's Exhibits Nos. 865 through 870 for identification.)

Mr. Wright: Would you——

Mr. McClennen: Before you get to those, would you let us have these?

Mr. Wright: I will hand you these while he is marking [fol. 3504] the others. Mark these 871 and 872, respectively.

(Thereupon two agreements referred to were marked as Plaintiff's Exhibits Nos. 871 and 872 for identification.)

Q. I show you these documents marked——

Mr. McClennen: Before you go on, would you let us know what they are, so we can follow them? 865 is a Paramount, August 20, 1935, with Young & Whitney.

866 is a Paramount unsigned. I don't see the date at the moment.

867, Columbia. I don't see the date.

868, Warner, October 17, 1935, approval date.

869, United Artists, sometime in—February 1st, 1936.

Mr. Wright: Those are all marked as one exhibit. Those United Artists contracts are all marked as one exhibit.

Mr. McClennen: And there are three of the same date. 870 is an R.K.O., January 20, 1936.

By Mr. Wright:

Q. I show you this memorandum of agreement marked as Exhibit 871 for identification, which is dated December 10th, [fol. 3505] 1936, and ask you if you recognize the signatures on that agreement?

A. Yes, sir, I do.

Q. The signature on behalf of Young & Whitney, is that Mr.——

A. Frank C. Whitney.

Q. On behalf of the Perry Theatre Corporation?

A. John A. May.

Q. Was that document, Exhibit 871 for identification, made on or about the date it bears?

A. It was made on that date.

Q. Then I will show you this Exhibit 872 for identification, and ask you if you recognize the signatures on that?

A. Yes.

Q. Those are——

A. Frank C. Whitney, and Robert I. Pierce.

Q. The second is your signature?

A. Yes.

Mr. Rogers: Will the witness please speak up? We can't hear him here.

Q. Who signed that on behalf of the Perry Theatre Corporation?

A. I think it is Schussman or something, I can't make it out.

Q. Selzmer?

A. That is right, Selzmer.

[fol. 3506] Q. This agreement dated May 24, 1937, marked as Plaintiff's Exhibit 872 for identification, that was executed on that date, was it?

A. Right, yes, sir.

Mr. Wright: We offer 871 and 872 in evidence.

Mr. McClennen: This 872 ought to be fastened together. It is loose, three pages of it.

(Thereupon Plaintiff's Exhibits 871 and 872, previously marked for identification, were received in evidence.)

The Court: Are there any questions raised about these other exhibits?

Mr. McClennen: There is no objection.

The Court: I mean the others as well. You mentioned a group of them.

Mr. McClennen: These others have not been offered yet.

The Court: I did not know whether there was an objection or not.

Mr. McClennen: I don't know whether they are going to be offered.

The Court: It has not been offered. I assume they will be. You can look them over.

Mr. Wright: Yes, they will be offered.

Mr. McClennen: They will be offered as part of this witness' testimony?

[fol. 3507] Mr. Wright: Yes, I was going to ask him a question as to what they were, and then offer them—where they came from.

Mr. McClennen: There is no objection to them if they will be offered.

The Court: If it is by consent, you can state what they are.

Q. As I understand it, these contracts that have been marked as exhibits for identification 865 through 870, inclusive, are all of the contracts that you brought with you which relate to feature pictures and were made by you during the period from 1932 to 1936?

A. That is all I had in my possession, yes, sir.

The Court: 1932 to 1936, you say?

Mr. Wright: Yes.

Mr. McClennen: It is suggested to me, if your Honor please, as to Exhibit 871 and Exhibit 872, that in what I have just stated, we are not waiving our general objection.

The Court: Oh, no.

Mr. McClennen: That these are purely local transactions, and they are not admissible. We desire to have that objection apply to these as well.

The Court: Received.

[fol. 3508] (Thereupon contracts previously marked as Plaintiff's Exhibits 865 through 870, inclusive, for identification were received in evidence.)

Mr. McClennen: I notice that Exhibit 872 refers to an agreement executed concurrently therewith, which is not with the paper. The agreement 871 is an agreement five months earlier in date, so that the whole of the May 24th, 1937 transaction is not shown by Exhibit 872.

[fol. 3509] Q. Mr. Pierce, was there another agreement executed on the 27th when Exhibit 872 was executed?

A. This agreement was made previous to that.

Q. Wait a minute. The date on this 871 is December 10, 1936?

A. That is right.

Q. The question I asked you was whether when either one of these agreements were made, 871 or 872, were there any other agreements made on those dates?

A. I don't think there was. I don't remember.

Q. Then do you remember when you turned over possession of the Capitol Theatre to Schine?

A. September 1, 1937.

Q. September 1, 1937. Were there some more papers exchanged on that date? Just possession of the theatre?

A. Just possession. Oh, yes, there were papers. No, I wouldn't say there was.

Q. As far as you know, the only agreements you made——

A. This was the agreement which was fulfilled on September 1, 1937.

Q. When you say "this", you are referring to 871 and 872?

A. This one here, the purchase.

Q. After this agreement, 871, was made, did you have anything to do with buying a film for the theatre?

A. No, I didn't buy any further film.

Q. That is, after December, 1936?

[fol. 3510] A. After this agreement was signed I didn't buy any further film since Schine took it over.

Q. Prior to December, 1936, what, if any, connection did you have with the buying of the film for the Capitol Theatre?

A. I done all the buying.

Q. That is, during the period from the time you took it back from Fox until you sold it to Schine?

A. That is right.

Q. I call your attention to the provisions in this Exhibit 870, 865, 866 and 868, the provision, "Ten days after Herkimer." Do you recall whether you had any conversation with any of the exchange managers about that provision?

A. About the clearance situation on this particular contract?

Q. On the contracts that you made with, let us say with Warner Bros., who did you deal with?

A. Personally with Ray Smith.

Q. Who was he?

A. He was a branch manager.

Q. When you dealt with Smith did you have any conversation with him with respect to where you were with reference to Herkimer?

A. I asked for reduction of clearance.

Q. Just answer yes or no to the conversation.
[fol. 3511] A. Yes, I did.
Q. Do you recall when you had that conversation with him or those conversations with him?
A. It was when he was in my office negotiating for the contracts.
Q. That was more than once?
A. Every time. Every year when I negotiated contracts.
Q. During what years?
A. Every year on the purchase.
Q. 1933-34?
A. '33, '34, '35.
Q. What was said when you talked to him in your office?

Mr. McClennen: That is objected to, three different conversations should not be included in one question.
The Court: The first one you recall.
Mr. McClennen: We object to the conversation anyway, the contract tells what contract they made.
The Court: Sustained. State the talks separately and as near as you can the time.

Q. Can you recall any particular one as distinguished from another?
A. This contract, for instance, here.
Q. By "this one here," you are referring to this Exhibit 868 of Warner's?
[fol. 3512] A. Yes.
Q. What is the date of that?

Mr. Wright: That is dated October 7, 1935.

Q. At the time you made that contract do you recall whether you had any conversation with Mr. Smith about the clearance?
A. Yes, sir.
Q. Where was that?
A. In my office in Ilion.
Q. At Ilion?
A. Yes.
Q. What was said then?

Mr. McClennen: Same objection.
The Court: Overruled.

A. Part had been sold at Herkimer and clearance had been given.

Q. Was anything said by you in reference to the clearance?

A. I was told it was out of their hands.

Q. Trying to get at what you said, if anything.

A. There wasn't much I could say, except ask for reduction on the clearance, which was not granted.

Q. Had you prior to that time asked Mr. Smith for a reduction in that Herkimer clearance?

A. The previous year.

Q. Do you recall what it was?

[fol. 3513] A. No, I don't.

Q. Whe-ver you negotiated the contract?

A. Whenever I negotiated the contract.

Q. What was said then?

Mr. McClennen: Objected to.

A. Practically the same thing.

The Court: Was that about the same time as the other contract?

The Witness: Yes.

The Court: State the conversation.

Mr. Wright: As clearly as you can recall.

A. The product had already been sold in Herkimer. I couldn't negotiate a different contract.

The Court: What did you say to him on that subject?

The Witness: That the contract—clearance had been set up at Herkimer. I could buy the pictures that way. I asked him for clearance but he couldn't give it to me. I could ask for reduction but he couldn't grant it.

The Court: What did he say?

The Witness: Reduction in clearance?

The Court: Reduction in clearance. Why did he say?

The Witness: The pictures had already been sold to Herkimer with a clearance.

Q. Did you discuss with him at any time playing pictures [fol. 3514] at Ilion with or ahead of Herkimer?

A. I discussed it with him but it was useless because they didn't sell me my product until after they had sold Herkimer.

Q. Did you have any discussion with him as to the relative character of the theatres at Herkimer and your theatre?

Mr. McClennen: That is objected to.

The Court: The question is the conversation was had. It is leading.

Mr. Wright: Strike it out.

Q. Now did the Schine theatres at Herkimer compare with your theatre with reference to size and age and general construction?

Mr. McClennen: That, if your Honor please, has been ruled out time and again. He can describe each of the theatres, not the comparison.

The Court: That is very true. I don't know how he can base the question of the priorities here on the size of the theatre.

Mr. McClennen: The objection I am making——

The Court: I am agreeing with you.

By Mr. Wright:

Q. You know what the age of the Schine theatre in Herkimer was?

A. It was two years older than the Capitol.

[fol. 3515] Q. What was its size, about?

A. Its size was, I think, around 1100.

Q. Do you know how many of those seats were in the balcony?

A. I think there were more seats—close to 600 seats—more seats in the balcony.

Q. What is the general character of the population of Ilion?

A. Ilion has a little different type population. It doesn't have quite as many foreign extraction as Herkimer. It is practically all American mechanics, where Herkimer, I think, has a large portion of foreign population.

Q. What were the admission prices at the Schine theatre at Herkimer and your Capitol Theatre at Ilion?

A. The same.

Mr. McClennen: At what time?

Q. During the period 1933 through 1936.

A. 10, 20 and 30 cents, same both places.

Q. 10 for what?

A. 10 for children, 20 balcony, and 30 for loges and lower floor.

Q. Who did you deal with at Paramount?

A. Eastman.
Q. Where did you see him?
A. In his office.
Q. Whereabouts?
[fol. 3516] A. Albany.
Q. Did you have any discussion with him there as to when you could play films with reference to when they played in Herkimer?
A. I was not allowed to buy them until they had already been sold to Herkimer.

Mr. McClennen: I ask to have that stricken out.
The Court: It is not responsive.

Q. You will have to state, as nearly as you can, just what was said, what you had to say and what he had to say.

Mr. McClennen: General objection.
The Court: Approximately the time when it was said.

A. Asking him for reduction of protection, I was told the same thing, that they had already been sold with protection in Herkimer.
Q. What occurred —
A. All the major companies.

Mr. McClennen: May that be stricken out, if your Honor please?
The Court: Not responsive. Strike it out.

Q. That occurred with reference to Paramount on how many occasions would you say during the period 1933 through 1936?
A. Every year.
Q. Every year when you made a season deal?
A. There was one year that we were led to believe that [fol. 3517] we might purchase Paramount.
Q. Do you know what year that was?
A. I don't know off-hand. I think it was 1933 or 1934.
Q. What was the conversation you had with them that year?
A. That they had closed with Schine at that time.
Q. Do you remember what time of the year that was?
A. No, I do not.
Q. What else was said?
A. That was all.

Mr. McClennen: Objection.

A. That they had closed with Schine and I might buy the pictures clear.

Q. Clear of what?

A. Protection.

Q. Clear of Herkimer protection. Were you given a chance to buy them that way?

A. No, I was not. Eventually Schine bought the pictures with protection.

Q. Who did you do business with at RKO?

A. C. R. Halligan.

Q. He was what?

A. Branch Manager.

Q. At Albany?

A. Yes.

Q. Where did you see him when you talked to him about a deal?

[fol. 3518] A. At my office in Ilion.

Q. Did you have any conversation with him about playing pictures clear of Herkimer?

A. Yes, sir.

Q. When did you talk to him about it?

A. At the time I negotiated the contract.

Q. You mean each year?

A. Each year, yes.

Q. That is during the period 1933 through 1936?

A. Yes, sir.

Q. What was said then?

Mr. McClennen: The same objection.

The Court: Overruled.

A. The pictures had already been sold in Herkimer, with existing protection.

Q. What was said by you?

A. There was nothing I could say. I either had to buy them or let them go. Didn't have any choice.

Q. Were you doing business with Fox then?

A. Yes, sir.

Q. Who did you make your Fox deals with?

A. Made those with a salesman. I think his name was Keith Goldsmith.

Q. Did you have any talks with Goldsmith about playing clear of Herkimer?

[fol. 3519] A. I did.

Q. When did you talk to him about it?

A. The day we signed the contracts.

Q. You mean each year that you made a season deal?

A. Yes.

Q. What was said then?

Mr. McClennen: Same objection.

The Court: The same ruling.

A. Pictures had already been sold at Herkimer, existing protection was granted.

Mr. Wright: I will ask to have this marked with the next plaintiff's identification number.

(The letter referred to was marked as Plaintiff's Exhibit 873 for identification.)

[fol. 3520] Q. I will show you this exhibit 873 for identification and ask if you recognize the signature on there?

A. Yes, Keith Goldsmith, Salesman for the Fox Film Corporation.

Q. Was that signed and given to you on or about the date it bears?

A. It was a rider attached to our contracts.

The Court: Contract of that year?

The Witness: That year. Mr. Schine has the contracts now.

Mr. Wright: I will offer Plaintiff's Exhibit 873 in evidence.

Mr. McClennen: This is objected to, if your Honor please, because it is part of the contract on its face, and the contract is not attached to it, so that it is not a whole document.

The Court: Should it not be included with the contract exhibit?

Mr. McClennen: The contract exhibit has not been offered.

Mr. Wright: He hasn't got the contract. He said these were all the contracts that were marked, for feature pictures.

The Court: Let me see it.

Mr. McClennen: It is also evident that it is an unauthorized statement, agreement, not signed by any authorized [fol. 3521] representative of the company.

The Court: Overruled.

(Thereupon Plaintiff's Exhibit No. 873 previously marked for identification was received in evidence.)

Q. After you got that Exhibit 873, do you recall whether any of the other major companies sold you any features with less than ten days protection in favor of Herkimer?

A. No, it was ten days. It states ten days there, written "ten days" on the contracts.

Q. Whom did you do business with at Metro?

A. Ralph Pielow.

Q. Where did you see him?

A. I think the last contract was signed in my office.

Q. At Ilion?

A. Ilion.

Q. Did you ever discuss with him whether or not you could play films at the Capitol clear of Herkimer?

A. I did.

Q. What did he tell you?

Mr. McClennen: Same objection.

The Witness: Same thing, pictures had already been sold to Herkimer with existing clearance.

Q. How often were you told that?

A. Every time I negotiated for new contracts.

[fol. 3522] Q. That was once a year?

A. Once a year.

Q. Do you recall whom you dealt with at Universal?

A. I can't place the name. The last year it was Nate someone, but I can't recall the name. Nate Sauber, I think.

Q. Where did you see him?

A. In his office.

Q. Where?

A. At Albany.

Q. Did you have any talk with him about playing pictures clear of Herkimer?

A. I did.

Q. What did he tell you?

A. Same thing.

Mr. McClennen: Same objection.

The Witness: Pictures had already been sold at Herkimer.

The Court: When was that?

The Witness: The last contracts that I signed.

The Court: What is the date of that, 1936?

The Witness: 1936.

Mr. Rogers: Will the witness please raise his voice? We can scarcely hear him.

Q. Did you talk to him about it before then?
A. I talked to him every time we signed a contract.
Q. That was how often?
[fol. 3523] A. Yearly.
Q. What was said in the prior years?

Mr. McClennen: Same objection.
The Court: The same man each year?
The Witness: No, no. That year. The previous year I think it was a fellow by the name of Dana in the office.

Q. Do you remember the conversation?
A. I am kind of vague on Universal, because they changed managers so often.
Q. Do you remember what conversation you had with Dana?

Mr. McClennen: Same objection.
The Court: Overruled.
The Witness: Practically the same, asked for reduction in clearance.

Q. You said you asked for reduction in clearance. What did he say?
A. Pictures had been sold to Herkimer with existing clearance.
Q. United Artists, whom did you deal with?
A. Salesman.
Q. Do you remember his name?
A. I don't remember his name.
Q. I will show you this Exhibit 869, United Artists contract, and ask if that refreshes your recollection?
[fol. 3524] A. Herman. The last name is Herman.
Q. Where did you see him?
A. At my office.
Q. Did you have a conversation with him about playing clear of Herkimer?
A. No, I don't remember in that particular case that I did, United Artists. I knew the pictures had already been sold to Herkimer.
Q. Do you remember having any conversation with anybody from United Artists about that clearance?
A. No.

The Court: Did Schine have any theatres in Ilion?
The Witness: He has now, yes.

The Court: At that time?

The Witness: No, he did not.

Mr. Wright: I think that is all, except these exhibits. I suppose it may be understood that they be read in evidence.

The Court: Yes, they are in evidence.

Mr. McClennen: That is, we understand that Exhibits 865 to 870 are now in evidence?

The Court: Is there any point you make about those exhibits?

Mr. Wright: What is that?

The Court: Is there any point you make on any of these [fol. 3525] contracts?

Mr. Wright: They show the amount of purchase price and the one agreement, I believe, is an agreement not to compete for a period of ten years on behalf of Mr. Whitney and Mr. Pierce in any similar business in the Village of Ilion or within a radius of 35 miles. I have just been informed by Mr. Kallis in response to a subpoena served on the distributors they have produced contracts for this same period. I am going to offer——

Mr. McClennen: Before you get to new exhibits, while we are dealing with the introduction of 865 to 870, it is called to my attention that 870 is a short.

Mr. Wright: That is attached to a feature contract.

Mr. McClennen: The paper marked Plaintiff's Exhibit 870——

Mr. Wright: If you object, I will be glad to remove it and have the stamp placed on the feature contract.

Mr. McClennen: That will simplify it.

Mr. Wright: Put this 870 stamp on here.

(Handing to reporter.)

Mr. McClennen: And cross it off the other one, so that we do not have confusion.

[fol. 3526] The Court: These are the same contracts.

Mr. Wright: The contracts I introduced in evidence were those that the witness produced. In pursuance to a subpoena served on the distributors, they have produced some, and I think before offering them I had better compare the ones he produced so that there are no duplications. I will put in those which are not duplicates of what are already in evidence. You may cross-examine.

Mr. McClennen If later contracts are going to be put in as part of this witness' testimony, they ought to be put in

before he leaves the stand. I have no objection to going ahead with the cross-examination now.

Mr. Wright: That is what I intended. I just wanted to compare these with the ones produced by the distributors, so that we can eliminate any duplications.

Mr. McClennen: I was merely calling attention to the fact that they ought to go in as part of this witness' testimony, while he is on the stand.

The Court: They will.

Mr. Wright: That is right.

Mr. McClennen: Then we are in accord.

[fol. 3527] Cross-examination.

By Mr. McClennen:

Q. I want to show you these exhibits and see if you have not, I think inadvertently, made an error in one of your statements. You notice Exhibit 871 is an agreement of December 10, 1936, calling for a subsequent sale of the properties therein mentioned. If you will speak out loud, because we all want to hear.

A. Yes.

Q. Now, pursuant to that agreement, among other things, as a part of that sale, you executed this agreement, Plaintiff's Exhibit 872, of May 24, 1937?

A. That is right.

Q. And in that you observed that there is a reference to a sale and conveyance by agreement executed concurrently herewith. Now, you notice that in Exhibit 871, there was no conveyance. Is it not a fact that on May 24th, 1937, you did concurrently with the execution of 872, execute a conveyance?

A. No, I don't recollect.

Q. Well, now, I show you Exhibit for Identification number, Plaintiff's Exhibit 85 for identification, an agreement dated May 24th, 1937. This is a photostat, and do you recognize the signature of Frank C. Whitney on there for [fol. 3528] Young & Whitney, Incorporated?

A. Yes.

Q. As you see that, it enables you to state, does it not, that at the time of executing Exhibit 872, May 24th, 1937, Young & Whitney, Inc., did also execute a conveyance?

A. Yes. It was such a long period, I have forgotten some of the papers.

Q. I was sure it was just an inadvertence on your part. Without going into the details of the instrument, that was a conveyance of the whole ownership of the Capitol Theatre in Ilion, and a transfer of a lease of the Temple Theatre in Ilion and a transfer of the old Opera House property?

A. That is right.

Q. Those properties in Ilion had all been in the ownership and control of Young & Whitney, Inc., at least since the early part of 1933?

A. That is right.

Q. And there was no Schine interest in Ilion at that time?

A. No, there was not.

Q. And there was but one theatre operating company in Ilion at that time, namely——

A. Young & Whitney.

Q. Young & Whitney, Inc.?

[fol. 3529] A. That is right.

Q. How far away was Herkimer?

A. Three miles.

Q. From 1929 to something like 1933, the Fox Metropolitan operated the Ilion Theatre?

A. Yes.

Q. And the Herkimer Theatre?

A. That is right.

Q. And in those days the Herkimer Theatre had a clearance of 14 days over Ilion?

A. That is right.

Q. When you or the Young & Whitney Company made their first contracts in 1933 for product after that company had reacquired that Ilion operation, you bought subject to a 14-day clearance in favor of Herkimer?

A. No, it was reduced to ten days, I think, in some instances.

Q. Well, now, aren't you thinking of a later date, and before I ask you to answer that question, I show you some agreements which I will ask to have marked for identification.

The Court: The agreement was marked?

Mr. McClennen: I see that I haven't here all that I want in this connection. May I have from Plaintiff's counsel the [fol. 3530] agreement of January 24th, 1933, the Paramount contract with Young & Whitney, Inc., for the year 1932-1933 product?

Mr. Wright: They are all here together. I think that is the top one. I was going to put them all in a folder, and if we had a folder, it would not be necessary to mark these contracts separately.

Mr. McClennen: I think I should want these with a separate number for the examination of this witness.

Mr. Wright: All right.

Mr. McClennen: May I also have the contract of March, 1933, of R.K.O. with Young & Whitney for 30 features of the 1932-1933 product for the Capitol?

Mr. Wright: Here is March 2nd, 1933, that is the group.

(Handing documents to Mr. McClennen.)

Mr. McClennen: And the Warner First National contract with Young & Whitney for the 1932-1933 product.

(Document referred to produced.)

Mr. McClennen: Perhaps instead of having them marked, in view of the suggestion that plaintiff desires to keep them together in folders, will you look at those that I have mentioned and recall that there was a clearance of 14 days [fol. 3531] in favor of Herkimer in the contract that you made for Ilion, that is, the Young & Whitney, Inc., made for Ilion in January, 1933. That refreshes your recollection?

The Witness: Yes, sir.

Q. That you did buy subject to 14 days clearance?

A. Yes.

Q. And would that enable you to say that in all those earlier contracts, while Fox Metropolitan was still operating the Herkimer Theatre, the Ilion theatres of Young & Whitney, Inc., were subject to a 14-day clearance in favor of Herkimer?

A. That is when Young & Whitney operated it?

Q. Yes.

A. Yes.

Q. And when Fox Metropolitan was still operating the Herkimer Theatre?

A. I presume it was the same clearance.

Q. Now, thereafter the Herkimer Theatre came into the hands for operation of the Schine organization?

A. That is right.

Q. And the clearance was reduced to ten days in favor of Herkimer over Ilion?

A. When you say—it was not returned immediately.

Q. But not long after the Schine organization took over?

[fol. 3532] A. That is right.

Q. From that time on the Schine organization did not receive as much clearance in favor of Herkimer as had been in operation under the Fox Metropolitan operation of Herkimer?

A. That is right.

Q. The means of communication between Herkimer and Ilion is over good roads, and they are short?

A. Yes.

Q. And there are people living within a mile and a half of your theatre in Ilion as it was, and a mile and a half of the theatre in Herkimer?

A. That is right.

Q. It was clearly a commercial benefit to Herkimer to have clearance over Ilion?

A. That is right.

Q. Would tend to make the patronage of the Herkimer Theatre larger than it would be if it did not have that clearance?

A. That is right.

Q. Herkimer is the shopping town of the area, is it?

A. Why, it is the county seat. I presume it would be classed as a shopping town, that is right.

Q. It is the local center of that general vicinity?

A. Yes.

[fol. 3533] Mr. Wright: I want to put the contracts in. I will have them marked by folders.

Mr. McClennen: Are you having them marked for identification?

Mr. Wright: I am offering them.

Mr. McClennen: Are you offering them in a group?

Mr. Wright: By distributors. I have season contracts for each distributor, that were produced by the distributors, in a separate folder, and I am asking to have each folder marked.

The Court: You mean each company's contracts in one folder, for several years?

Mr. Wright: Yes, that is right.

Mr. McClennen: Then may the contents of the folder, each paper, have a separate letter, so that we will know

what is in the folder, and a description in the stenographer's record of the date and parties to the contract?

The Court: Yes.

Mr. McClennen: Then if we find, in this wholesale introduction, that some things got in that ought not to be in we can call attention to it and have it taken out, if it should be.

The Court: Yes.

[fol. 3534] The Court: Surely.

(The five folders referred to, containing various contracts were received in evidence and marked Plaintiff's Exhibits 874, 875, 876, 877 and 878 in evidence, and each separate paper in each folder was marked commencing with "A", etc.)

(See last page of today's transcript for descriptive list.)

By Mr. Wright:

Q. I will show you these Fox contracts that are in evidence in this folder marked Plaintiff's Exhibit 877, and call your attention to the first four of them, which contain the words "Usual clearance". Can you say what that meant in those contracts?

A. "Usual clearance" meant the established clearance behind Utica and Herkimer.

Q. Established how?

A. By the Clearance Board in Albany.

Q. What was the Clearance Board?

A. I don't know. Members of the exchanges who arrived at the clearance, evidently.

Q. Then do you recall what the usual clearance was during this period?

A. Fourteen days, thirteen behind Utica, fourteen behind Herkimer.

The Court: To save time we will take a recess for five minutes.

(Short recess.)

[fol. 3535] By Mr. Wright:

Q. Mr. Pierce, did I understand you to testify on cross examination that when Fox had the theatres at Ilion and Herkimer——

A. When Fox had the Ilion theatre?

Q. Yes.

A. I know they did for a while.

Q. What the arrangements were; did you have anything to do with the contracts that Fox made?

A. Not the contracts. I managed it for Fox. I knew that the same condition existed.

Q. The name of the operating corporation was what, the Central New York Theatres, Inc.?

A. Not in Ilion. That was in Herkimer.

Q. Operated the Herkimer theatre. Did you ever see contract made by the Central New York Theatres, Inc., which simply sold the pictures first-run at the Liberty or Capitol at Herkimer or Ilion?

A. No, I never did.

Q. Did you see the contracts that were made?

A. No, I never did.

Q. You had nothing to do with making the contracts?

A. No, not under the Fox operation.

Q. You don't know what the clearance provisions, if any, were that prevailed between Herkimer and Ilion during the [fol. 3536] Fox operation?

A. I do not.

Q. And those would appear in whatever contracts Fox made?

A. That is right.

The Court: Operating the theatre, wouldn't you know the time? You operated the Ilion theatre while Fox was the owner of both. You would know?

The Witness: Yes, I would know. There was still a clearance existing. I managed it for seven months.

The Court: That clearance was fourteen or ten days?

The Witness: It was fourteen days when it started. I don't know how it finished up.

By Mr. Wright:

Q. What seven months are you talking about?

A. The first seven months.

Q. The first seven months that Fox took over?

A. Yes.

Q. Of the Central New York Theatres, Inc., operation?

A. That is right.

Q. Then you ceased to become manager and that would be the 1931-32 season?

A. That is right?

Q. Did you know what the clearance provisions of the contracts were at that time with Fox, that were negotiated? [fol. 3537] A. I did not. The bookings were all made in Syracuse.

Q. I understood you to tell the Court that you knew that there was a 14-day clearance continued at that time; is that correct?

A. My intention was not to say that.

Q. The fact is you don't know?

A. I had no access to the contracts whatever. I did not know what the bookings were that were arranged in the booking office in Syracuse.

Mr. Wright: That is all.

Recross-examination.

By Mr. McClennen:

Q. You did know when you got back the Ilion theatres, and the Fox Metropolitan was still operating the Herkimer Theatre, that the Herkimer theatre then at the beginning of 1933 had 14-days clearance?

A. Yes, I was aware of that as soon as I started operation.

Q. And you found that to be what was the then existing clearance?

A. That is right.

Q. And that is the clearance referred to in this Paramount contract, Plaintiff's Exhibit 878-A, dated January, 1933?

A. That is right.

Mr. Wright: If the Court please, I think the contract speaks for itself. I don't understand what he means by [fol. 3538] that. The contract states what the clearance was for that year.

Mr. McClennen: Yes, I have brought out the fact that this 14-day clearance was persisting at that time; I would make it perfectly clear,—and instead of the witness I could have called your Honor's attention to Plaintiff's Exhibit 878-A is a Paramount contract of January, 1933, and it provides for 14 days after Herkimer.

The Court: That was the clearance of all of the companies there at that time?

Mr. McClennen: At that time.

The Court: While he was operating Ilion and while Fox was operating Herkimer.

By Mr. McClennen:

Q. Now, you spoke of the Clearance Board at Albany. That was the Clearance and Zoning Committee set up under the N. R. A.?

A. That is right.

Q. And this Fox contract of September 20, 1934, which has the term clearance usually, I call your attention to these words in it, and I am referring to Plaintiff's Exhibit 877-B, the words "Clearance usual", and then the words "This contract is subject to the ruling of the Clearance and Zon-
[fol 3539] ing Committee"?

A. That is right.

Q. And that is what you had reference to as the Board?

A. That is right.

Q. And in the case of some of the companies at that time that was ten days, and in the case of others it was fourteen days?

A. That is right.

Mr. McClennen: That is all.

Redirect examination.

By Mr. Wright:

Q. Mr. Pierce, did you know at the time this contract with Paramount, dated January 24, 1933, was made, whether or not Schine or Fox was then operating the theatre at Herkimer?

A. Well, I must have been aware of it at the time. I can't recollect the date. I must have been aware who was operating the theatre.

Q. Do you have any recollection now?

A. No, I couldn't tell you.

Q. Whether it was Schine or Fox?

A. No, I couldn't.

Mr. McClennen: Mr. Wright, I don't want to intrude on your method of examination, but don't these contracts that

[fol. 3540] you put in show it was the Fox Metropolitan that was operating at Herkimer at that time?

Mr. Wright: I don't recall putting in any contract of Fox Metropolitan. The only contracts I offered were those made by Young & Whitney, and I don't think it appears in any of those contracts as to who was operating the theatre at Herkimer at the time any of these contracts were made.

The Court: Would it make such a difference whether the fourteen days continued prior to Schine?

Mr. Wright: I don't see it makes any great difference. I didn't want the witness to be led into making statements, by Mr. McClennen, that he was not competent to make.

The Court: Somebody here should be able to say which was in operation then.

Mr. Wright: The interrogatories should show.

Mr. McClennen: The interrogatories should show if at this time we did not have the Herkimer theatre.

Mr. Wright: If the witness can't recall, obviously, he can't state.

Mr. McClennen: The witness had recalled enough to say that he knew. Now, let me make sure.

[fol. 3541] By Mr. McClennen:

Q. Let me make sure. You were aware in the common sense, when you got your Ilion theatres back at the beginning of 1933, that the Fox Metropolitan operation was still going on at Herkimer?

A. Yes, they were, for several months, I think.

The Court: Next witness.

Lawrence J. Carkey, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live?
A. Utica, New York.
Q. What is your occupation?
A. Theatrical business.
Q. What theatre?

Mr. Rogers: Will the witness speak up? We can't hear him. Was that Utica, New York, where you say you lived?

The Witness: Utica, New York.

[fol. 3542] The Court: What theatre?

The Witness: Family Theatre.

Q. How long did you operate that theatre?

A. Since March 25th, 1940.

Q. Before that were you engaged in the theatre business?

A. Yes, sir.

Q. Where?

A. Prior to that I was in Pennsylvania.

Q. Operating theatres?

A. Yes, sir.

Q. Are you familiar with the Town of Ogdensburg, New York?

A. Yes, sir.

Q. Had you formerly run a theatre there?

A. Yes, sir.

Q. For whom?

A. Schine.

Q. When was that?

A. 1926.

Q. What was the name of the theatre?

A. Strand Theatre.

Q. You operated that for how long—you managed the theatre how long for Schine?

A. From September, Labor Day, until the following March.

Q. Then did you have occasion to be in Ogdensburg after that?

[fol. 3543] A. Yes, sir.

Q. Were you there in 1940?

A. Not operating theatres.

Q. When was the last time you had any connection with theatre operations there?

A. Oh, possibly 1928, something like that.

The Court: By that you mean some time other than the time you operated the theatre?

The Witness: I was division manager for the Schine Circuit, and I used to go in there after I left there as manager.

Q. That until 1928?

A. Between 1926 and 1928.

Q. What theatres were there in Ogdensburg at that time?
A. The Star, now the Pontiac and the Strand.
Q. Then did you go back there in 1940?
A. Yes, sir.
Q. What time of the year?
A. About in July.
Q. What theatres did you notice there then?
A. Strand and Pontiac.
Q. Were they both operating?
A. The Strand was operating.
Q. The Pontiac was closed?
A. I believe Saturdays and Sundays and week-ends.
[fol. 3544] Q. It operated Saturdays and Sundays?
A. Yes.
Q. How big is that Strand Theatre?
A. Oh, possibly thirteen or fourteen hundred seats.
Q. That was how old?
A. What was that?
Q. Do you remember when it was built?
A. It was built back in 1916.
Q. The Pontiac, how large was that?
A. Possibly 700 seats.
Q. Do you recall when that was built?
A. Prior to the Strand, way back.
Q. What was the occasion for your going to Ogdensburg in July, 1940?
A. I tried to find a location for a new theatre.
Q. When you went there, what did you do?
A. I found a location.
Q. Where?
A. City Market, in the City of Ogdensburg.
Q. Where was that City Market with reference to the theatres that were there?
A. On Isabella Street.
Q. Was there a theatre in it at the time?
A. No, sir.
Q. What, if anything, did you do about converting those [fol. 3545] premises to a theatre?
A. They were especially adapted for a theatre, the building.

Mr. McClennen: I move to strike that out.
The Court: Yes, it is not responsive. What did you do?
The Witness: What did I do?

The Court: Yes, what did you do?

The Witness: Repeat the question again, please.

(Question read.)

The Witness: Well, we hadn't done nothing.

Q. Well, did you talk to any city officials about——

A. We talked to the Mayor and the City Clerk.

Q. Then after you talked to the city officials about that, did you return to Ogdensburg again?

A. Yes, sir.

Mr. Wright: I will ask to have this certified copy of the minutes of a meeting of the Common Council held September 4, 1940, marked with the next exhibit number for identification.

(Thereupon certified copy of minutes of Common Council meeting at Ogdensburg, marked as Plaintiff's Exhibit No. 879, for identification.)

Q. I will show you Plaintiff's Exhibit 879 for identification and ask you if the part beginning "City Treasurer, [fol. 3546] City of Ogdensburg, dated August 10, 1940" is a copy of a communication from you?

A. Yes, sir.

Mr. Wright: I will offer this exhibit in evidence.

Mr. McClennen: We object on the ground that this is most local in its character, would be a local transaction if it could be described as a transaction, but it is no transaction at all, not in any way admissible in this case, and not to be put in through this witness, having no relation whatever to the defendants in any way.

The Court: Is this certified by the clerk?

Mr. Wright: Yes, this is certified by "I, Simon S. Sargent, City Clerk of said city, do hereby certify"——

The Court: Let me see what it says. I thought counsel said it was not connected with the witness in any way.

Mr. Wright: No, he said, I believe, not connected with the defendants in any way.

The Court: Objection overruled, received.

(Thereupon Plaintiff's Exhibit No. 879, previously marked for identification, was received in evidence.)

[fol. 3547] Mr. Wright: Mark these.

(Thereupon two blue-prints referred to were marked as Plaintiff's Exhibits No. 880 and 881 for identification.)

Q. Then, after your bid was accepted, Mr. Carkey, did you have any plans prepared?

A. Yes, sir.

Mr. McClennen: That is objected to, if your Honor please. It does not appear that the bid was accepted. It appears there was a vote of the City Council on the exhibit your Honor has let in.

The Court: It was accepted by action of the Council, the very last clause.

Mr. Wright: It states here: "Alderman Caldwell moved that the bids as enumerated be accepted with the exception of the MacNaughton Market Lease in the bid of Ernest Whitcomb on nine lots. Seconded by Alderman Ramie, all voting in the affirmative with the exception of Alderman Doe voting nay. Motion carried."

The Court: Read the very last.

Mr. Wright: At the bottom of the second page, "Alderman Caldwell moved that the bid of L. J. Carkey be ac-[fol. 3548] cepted subject to a lease to be drawn up by the Market Commissioner together with the Corporation Counsel for a term of ten years with an option of five years. Carried, ayes all."

The Court: What is that certificate? I did not look at the certificate. It seems to be contradictory.

Mr. Wright: I do not so understand it.

The Court: Oh, I see. I will permit him to answer that he drew—certain plans were drawn at a certain time.

Mr. McClennen: My objection was to the characterization in the question.

The Court: Yes.

Mr. McClennen: If what he wants to show is after that date——

The Court: Objection sustained.

Q. I will show you these plans marked Plaintiff's Exhibits 880 and 881 for identification, and ask you if you can tell us what those are?

A. These are plans for the proposed theatre on the MacNaughton Market Building in Ogdensburg.

Q. Who prepared that?

A. Michael D. De Angelus.

[fol. 3549] Q. He is a theatre architect?

A. Yes.

Q. About when were those prepared?

A. Between July 15th and August 15th of 1940. I think it was August 26th, to be exact. I am not sure. It is in there somewhere. I am not sure of the date. It may have been September.

Q. Some time in August or September?

A. That is right.

Mr. Wright: I will ask to have this letter and lease marked with the nex two exhibit numbers.

(Thereupon copy of letter and lease referred to were marked as Plaintiff's Exhibits 882 and 883 for identification.)

Q. I will show you these exhibits 882 and 883 for identification and ask you if you can say what those are, respectively?

A. Yes, it shows the William B. O'Connell——

The Court: What are they?

The Witness: It is a letter enclosing a copy of proposed lease from the City Council in Ogdensburg.

Q. The letter you refer to is Exhibit 882 for identification?

A. Yes, sir.

Q. You received the original of that letter?

[fol. 3550] A. Yes, sir.

Q. On or about September 30th?

A. Yes, sir.

Q. 1940. With the letter was enclosed this agreement marked Exhibit 883?

A. Yes, sir.

Mr. Wright: I will offer 882 and 883 and 880 and 881.

Mr. McClennen: These three exhibits are objected to on the grounds already stated with respect to the vote. Exhibit 883 is particularly objected to on the further ground that it never became an effective instrument and is not in accordance with the terms of the vote or the bid which the vote purported to accept.

The Court: I think it would be competent, if at all, on the question of what activities the witness made. It would be

competent, if at all, to show what activities he engaged in in connection with the effort as claimed to construct a theatre. Not the question of the contents of the instrument. The fact some instrument was prepared. I don't think these plans—he testified the plans were drawn. I think the two [fol. 3551] exhibits should be received as going to show the activities on the part of the witness directed to the purpose.

Mr. Wright: By the two you are referring to 882 and 883. There isn't any claim that this lease was actually entered into.

The Court: The only reason is, showing what his activities were in that connection.

(Thereupon Plaintiff's Exhibits 882 and 883, previously marked for identification, were received in evidence.)

Q. Did you execute a lease with the city for this property described in Exhibit 883?

A. No.

Q. Did you go ahead with any theatre project in Ogdensburg?

A. No, sir.

Q. Why not?

Mr. McClennen: That is objected to.

The Court: I will let him state what occurred.

The Witness: I couldn't get the film of the product for the City of Ogdenburg.

Mr. McClennen: I move to strike that out.

The Court: Yes. State what occurred.

Q. Tell us what, if any, efforts you made to get——

[fol. 3552] Mr. McClennen: May that go out, what he said, if your Honor please?

The Court: Yes, strike it out. He made an effort to get films, he said.

Mr. Wright. Just a minute.

The Court: State what happened.

The Witness: After the proposed lease was offered me?

The Court: Yes.

The Witness: I made an effort to contract the various major picture companies for product for this proposed theatre in Ogdensburg. I was advised by each one of them——

Mr. McClennen: May that be stricken out?

Q. Just tell us who you contacted and where.
A. I contacted M.G.M., Warner Brothers, Columbia——

The Court: Who, that is the point?
The Witness: Gene Vogel of M.G.M., salesman. George Tucker of R.K.O., salesman. Jerry Spandau, Universal, Manager. Richard Struwe, Warner Brothers, salesman. Jack Arms of Columbia, salesman. Fred Sliter, Fox salesman, and I can't recall the United Artists salesman.

[fol. 3553] Q. Were those salesmen you have referred to salesmen you were doing business with at Utica?
A. Yes, sir.

Mr. McClennen: That is objected to, if your Honor please, grouping masses of men in a question that way.
The Court: I will let him state he knew these men at certain points and certain places.
Mr. McClennen: That was not the question put, if your Honor please. I object to the question that was put.
Mr. Wright: I don't see that there is any objection to grouping that as such, if they fall into a group.
The Court: Objection overruled. Whether he did business with these men at Utica, is the answer "Yes"?
The Witness: Yes, sir.

By Mr. Wright:

Q. Where was it that you saw them with reference to product for Ogdensburg?

Mr. McClennen: That is objected to. It is obvious he couldn't have seen all eight of them at one place.
The Court: State where it was.

[fol. 3554] A. At my office in Utica.
Q. When was this? Can you recall the approximate time you saw any one of the particular individuals there?
A. July 15th, between the 1st and 15th of July.

The Court: Of '40?
The Witness: Of 1940, yes, sir.

Q. You say you saw them all then?
A. Between the 1st of July and July 15th.
Q. Then do you recall what order you saw them in, or which one you saw first? This is with reference to Ogdensburg.

A. I saw them one at a time, and do you want me to explain the conversation? I saw them one at a time.

Q. I want to fix the order, if you can. If you don't remember the order——

A. I don't know the order in which I seen them all.

Q. Do you remember the individual conversations you had with them?

A. Yes, sir.

Q. Which individual did you talk to there?

A. Richard Haas of Paramount. I called him in my office from Albany, told him I was negotiating for a theatre——

Mr. McClennen: This is subject to our objection.

The Court: Go ahead.

A. —I was negotiating and had an O.K. to erect a theatre in Ogdensburg and asked him if second-run product was [fol. 3555] available in the city of Ogdensburg and he told me that he thought—he told me that second-run product was not sold in the city of Ogdensburg; and I told him I would be ready in a few weeks to talk to him about product. He said, "All right".

Q. And who else did you see at that time?

A. I seen Jack Arms of Columbia Pictures Corporation along about the same time, and asked him—told him I was about to erect a theatre in Ogdensburg, and asked him if second-run product would be available in Ogdensburg, and he told me "Yes".

I seen Richard Struwe, a salesman for Warner Bros., and told him that in a few weeks I would be ready to talk business with him on product for the city of Ogdensburg, if it would be available, second-run, and he told me "Yes".

I contacted George Tucker, salesman for R.K.O., and told him in a few weeks I was thinking—I had a proposed lease, erecting a theatre in Ogdensburg, and asked him if he would have second-run product available, and he told me "Yes". He didn't know of any second-run product sold in Ogdensburg. He knew it was not.

I contacted Gene Vogel, salesman for M.G.M., and asked him if second-run product would be available in Ogdensburg [fol. 3556] that fall, and he told me there was no second-run product sold. I contacted Jerry Spandau, Manager of Universal, and asked him if the second-run product was available in Ogdensburg, and he told me "Yes". I told him I would be ready to talk to him in a few weeks.

I talked with Fred Sliter, salesman for Fox, and asked him if second-run product would be available in Ogdensburg in a few weeks and he told me "Yes".

That cleans up the major product and people I talked with.

Q. When was the next time you talked with these people you just mentioned about product for Ogdensburg?

Mr. McClennen: I have not interposed a separate objection. Of course, it is understood it applies to all that.

The Court: Yes.

A. This first talk I was telling you about was prior to the proposed lease. It was before I received this proposed lease and then I started and went through this thing with the city officials in Ogdensburg.

Mr. McClennen: I ask to have it stricken out, if your Honor please.

The Court: Yes, strike it out. What happened afterwards?

[fol. 3557] A. I went ahead with the negotiations for this lease and contacted——

Mr. McClennen: I ask to have it stricken out, if your Honor please.

The Court: No.

Mr. McClennen: Conclusion of that kind, if it is admissible at all, it should be that he saw so-and-so and talked with so-and-so, or wrote so-and-so and talked with so-and-so, and not his conclusion. I object to the answer and ask to have it stricken out.

The Court: Did you get through with your negotiations? Did you describe the negotiations and talk?

Mr. McClennen: It is for the Court to determine. It is not for the witness.

The Court: State what was done.

The Witness: I notified the Mayor and City Council and City Clerk in Ogdensburg that I was practically sure——

Mr. McClennen: Just a moment. It does not appear whether this was oral or written, and what he said in either instance, and not notified. I object to this.

The Court: Sustained.

[fol. 3558] Mr. Wright: I take it it is proper for him to say he notified the Mayor and City officials?

The Court: What was done? Did he talk to them or write to them?

Mr. Wright: I take it that comes under the head of what was done.

Mr. McClennen: If notification was in writing the paper should be presented.

The Court: He can say what he did.

The Witness: I drove to Ogdensburg personally. I told them I was practically sure of product.

Mr. McClennen: I object to this, if your Honor please.

By Mr. Wright:

Q. You went to Ogdensburg and you saw—when was this you made the trip you just referred to?

A. Around July 15th, around in there, perhaps before.

Q. Was this after you had the conversations with the film salesmen you just referred to?

A. That is right.

Q. You went to Ogdensburg?

A. That is right.

Q. And talked to whom there?

A. The City Clerk and the Mayor.

Q. Then what did you do after that?

A. Well, they advised me——

[fol. 3559] Mr. McClennen: That is objected to.

By Mr. Wright:

Q. You can't say what was said. Just tell us what you did.

A. I told them I was ready to proceed with this proposition.

Q. Then what did you do?

A. Well, I had to wait until they got permission from the State to lease that property for other than a market place. They had to get a court order in order to lease that property.

The Court: You mean the City had to get a court order?

The Witness: Yes, sir, because money appropriated for that property was partly appropriated by the State back in the old days when they had the farmers bring their produce there.

By Mr. Wright:

Q. Do you know whether such a court order was obtained?
A. Yes, sir.

Mr. McClennen: That is objected to.

The Court: Sustained. The Court order is the best evidence.

Q. What did you do then after you had these conversations in Ogdensburg? Did you go back to Utica?
A. I went back to Utica.
Q. Then did you see any of these film salesmen again?
A. Not yet, no.
Q. What did you do next?
[fol. 3560] A. I had to wait until I heard from Ogdensburg.
Q. Did you hear from Ogdensburg between August 15 and September 30 when you got this agreement, Exhibit 883?
A. Yes, sir.
Q. Well, was that in the form of a letter?
A. I don't recall.
Q. Well, do you recall about when it was?
A. Between August 15 and 30th.
Q. Between August 15th and August 30th?
A. I think it was around before the 15th of August. I think it was the last of July.
Q. Well, then, after you received this further word from Ogdensburg, did you then contact any of the film salesmen?
A. I didn't contact the film salesmen until after August 15th.

The Court: Didn't, what?

The Witness: Didn't contact the film salesmen again until after August 15th.

Q. How soon after did you see them?
A. Between August 15th and the next week or so.
Q. Where did you see them then?
A. My office in Utica.
Q. Who did you see at that time?
A. I saw Fred Sliter of Fox Film Corporation.
Q. What was said then?
A. Told him I was ready at that time to sign contracts
[fol. 3561] for second-run product in Ogdensburg, N. Y.

He advised me Schine had bought second-run. He told me they were told by their home office that Schine had bought second-run product in the city of Ogdensburg.

Mr. McClennen: Objected to, if your Honor please.

The Court: Receive it.

The Witness (Continuing): And it could not be available to me, although he could sell me third-run, which I was not interested in.

I contacted Mr. Struew of Warner Bros. and asked him to come in my office. He came in. I told him——

Mr. McClennen: Same objection, if your Honor please.

The Court: Same ruling.

The Witness (Continuing):—I was ready to talk product in the city of Ogdensburg, as per our conversation of a few weeks before. He told me he was very sorry for me, that he was instructed by his home office that Schine had bought second-run in the city of Ogdensburg.

I called in Jerry Spandau of Universal and his salesman was with him. I can't recall his name.

Mr. McClennen: Same objection to this.

[fol. 3562] The Court: Overruled.

The Witness (Continuing): I told him I was ready to talk to him about second-run product for the city of Ogdensburg, and he told me he was ready at that time and he could have made out a contract that day in my office for second-run product in the city of Ogdensburg. I called in Jack Arms, of Columbia. I told Jerry Spandau at that time—he was the first one who offered me second-run—and I told him I would see him in a coule of days, that I wanted to have the major companies in there. I was satisfied I could get second-run Universal.

I called in Jack Arms of Columbia and told him I was ready to talk second-run product for the city of Ogdensburg, as per our conversation of a few weeks before.

Mr. McClennen: Same objection.

The Court: Same ruling.

The Witness (Continuing): And he advised me second-run had been sold to Schine.

I called in Richard Haas of Paramount and told him [fol. 3563] I was ready to buy second-run product for the city of Ogdensburg as per our conversation——

Mr. McMcClennen: The same objection.

The Witness (Continuing): And he advised me Schine bought second-run product for the city of Ogdensburg. I called in Gene Vogel of M.G.M. and told him I was then ready to talk to him.

Mr. McClennen: Same objection.

The Witness (Continuing): And he informed me second-run product had been sold in Ogdensburg; that they had been informed by their home office of such fact.

I talked to George Tucker of RKO and he advised me second-run product had been sold in Ogdensburg, which left me only the Universal product.

Mr. McClennen: I ask to have the last stricken out.

The Court: The last may be stricken out.

By Mr. Wright:

Q. Then what did you do?

A. I had this proposed lease in my possession, ready to sign, so I wrote Ogdensburg, the County Clerk——

Mr. McClennen: I object to that.

[fol. 3564] Mr. Wright: You can't say what you wrote to them.

Q. After you saw these other salesmen did you go back and talk to Spandau about second-run?

A. No, I didn't.

Q. Did you have any further negotiations with any of the film companies for second-run in Ogdensburg?

A. No, sir.

Mr. Wright: That is all.

Mr. McClennen: No questions.

Mr. Wright: That is all.

The Court: We will suspend at this time until tomorrow morning.

(Whereupon a recess was taken until tomorrow, Wednesday, October 25th, 1944, at 10 o'clock A.M.)

[fol. 3565] (Contents of folder previously marked as Plaintiff's Exhibit 874 further identified as follows:

Contract between R.K.O. and Young & Whitney, dated March 10, 1933, marked as Exhibit 874-A.

Contract between Young & Whitney and R.K.O., dated February 21st, 1934, marked as Exhibit 874-B.

Contract between Young & Whitney and R.K.O., dated November 5th, 1934, marked Exhibit 874-C.

Contract between R.K.O. and Young & Whitney, dated March 3rd, 1937, marked as Exhibit 874-D.)

(Contents of folder previously marked as Plaintiff's Exhibit 875 was further marked as follows:

Contract between Young & Whitney and Warner Brothers, dated February 6th, 1933, marked as Plaintiff's Exhibit 875-A.

Contract between Young & Whitney and Warner Brothers, dated October 28th, 1933, marked as Exhibit 875-B.

Contract between Young & Whitney and Warner Brothers, dated October 11th, 1934, marked as Exhibit 875-C.

[fol. 3566] Contract between Young & Whitney and Warner Brothers, dated Ocober 17th, 1935, marked as Exhibit No. 875-D.

Contract between Young & Whitney, and Warner Brothers, dated August 31, 1936, marked as Exhibit No. 875-E.)

(Contents of folder previously marked as Plaintiff's Exhibit 876 was further marked as follows:

Contract between Young & Whitney and Metro, dated September 23rd, 1933, marked as Exhibit No. 876-A.

Contract between Young & Whitney and Metro, dated August 17, 1934, marked as Exhibit No. 876-B.

Contract between Young & Whitney and Metro, dated July 5th, 1935, marked as Exhibit No. 876-C.

Contract between Young & Whitney and Metro, dated July 10th, 1936, marked as Exhibit No. 876-D.)

(Contents of folder previously marked as Plaintiff's Exhibit No. 877 was further marked as follows:

Contract between Young & Whitney and Fox, dated September 6th, 1933, marked as Exhibit No. 877-A.

[fol. 3567] Contract between Young & Whitney and Fox, dated September 20, 1934, marked as Exhibit No. 877-B.

Contract between Young & Whitney and Fox, dated April 20th, 1935, marked as Exhibit No. 877-C.

Contract between Young & Whitney and Fox, dated October 2nd, 1935, marked as Exhibit No. 877-D.

Contract between Young & Whitney and Fox, dated 19th of May, 1936, marked as Exhibit No. 877-E.)

(Contents of folder previously marked as Plaintiff's Exhibit No. 878, was further marked as follows:

Contract between Young & Whitney and Paramount, dated January 24, 1933, marked as Exhibit No. 878-A.

Contract between Young & Whitney and Paramount, dated October 20, 1933, marked as Exhibit No. 878-B.

Contract between Young & Whitney and Paramount, dated January 18, 1935, marked as Exhibit No. 878-C.

[fols. 3568-3570] Contract between Young & Whitney and Paramount, dated July 5th, 1935, marked as Exhibit No. 878-D.

Contract between Young & Whitney and Paramount, dated August 26th, 1936, marked as Exhibit No. 878-E.)

[fol. 3571] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223

UNITED STATES OF AMERICA

vs.

SCHINE CHAIN THEATRES, INC., ET AL., Defendants

Continuation of trial before Honorable John Knight, United States District Judge for the Western District of New York, October 25th, 1944, 10 o'clock A. M.

APPEARANCES:

Robert L. Wright, Esq., John F. Clagett, Esq., Harold I. Schilz, Esq., Special Assistants to the Attorney General, and Philip Marcus, Esq., and Milton Kallis, Esq., Special Attorneys, in behalf of the United States.

Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homans, Esq., and Edward M. Antevil, Esq., appearing for the Defendants.

[fol. 3572] PROCEEDINGS

CHARLES S. CANTWELL, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

(Copy of Ogdensburg Journal, Thursday, September 26, 1940, page 7, was marked as Plaintiff's Exhibit 884 for identification.)

(Copy of Ogdensburg Journal, Saturday, October 26, 1940, page 4, was marked as Plaintiff's Exhibit 885 for identification.)

Mr. McClennen: If your Honor please, it appears by the record of yesterday that Exhibit 880, the blue print of September 17, 1940, and the Exhibit 881, are marked for identification only. I had had the impression they had been admitted over our objection.

The Court: They were not received.

Mr. McClennen: They were not received?

The Court: No. He testified the plans were drawn. Of course, Counsel, if you desire to inquire——

Mr. McClennen: No, I just want to be sure that the record was as the matter was left.

[fol. 3573] Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. Cantwell?

A. Ogdensburg, New York.

Q. What is your occupation?

A. Managing Editor of the Ogdensburg Journal.

Q. How long have you held that position?

A. That particular position since 1928.

Q. I show you a document that has been marked for identification as Plaintiff's Exhibit No. 884 and ask you if you recognize that as page 7 of the Ogdensburg Journal for Thursday, September 26, 1940?

A. That is right.

Q. And I call your attention to the article in the third column from the left at the bottom of the page, headed "Schine Pontiac to open on seven-day basis." Can you tell the Court where you got the information that is carried in that article?

Mr. McClennen: Just a moment. It has not appeared he got the information and it is only material if it comes from somebody connected with us.

Mr. Wright: Well, I asked him where he got it.

Mr. McClennen: That is, the person from whom he got it?

The Court: Did you get the material that appears in that exhibit?

[fol. 3574] The Witness: I handled this particular article, yes.

The Court: Now the question is: What was the source of the information that appears in that article?

The Witness: This article was brought in to my office by Jacob Weber, who was the Manager of the Strand Theatre in Ogdensburg.

The Court: By Mr. Weber?

The Witness: Yes.

The Court: Go ahead. Does that appear as an advertisement?

Mr. McClennen: That was a news article.

The Court: Oh, a news article?

The Witness: A news article quoting Mr. Weber.

By Mr. Wright:

Q. Then I call your attention to this document that has been marked for identification as Exhibit 885 and I ask you if you recognize that as page 4 of the Ogdensburg Journal for Saturday, October 26, 1940?

A. That is correct.

Q. And I call your attention to the ad headed "Schine Pontiac" at the bottom, in the left-hand corner. Do you recall whether that was published as a paid ad on that day?

A. I have no connection with the advertising department but I can testify that it was published on that day in the Journal on that page.

[fol. 3575] Q. And that it was an advertisement?

A. An advertisement of the Pontiac Theatre.

Mr. Wright: I will offer these Exhibits 884 and 885, but it has been already agreed with Counsel that if they are received the papers themselves need not be detached and the data we have referred to, appearing on those exhibits, may simply be read in evidence, and we have already had the reporter record the contents.

Mr. McClennen: We object to the introduction of the papers.

The Court: Well, I think Exhibit 884, the first one, should be received. The next question is: Does it show here who put the advertisement in?

Mr. Wright: I beg your pardon?

The Court: It does not show here who put the advertisement in.

Mr. Wright: If the Court please, I don't think there is any dispute about the fact it is in the record that the Strand

Theatre there is the Schine Theatre and I don't think there is any doubt but what anybody else, other than the Schine people, advertised the attractions at the Schine theatre.

The Court: Of course, what we don't think about it is not [fol. 3576] very conclusive.

Mr. Wright: I take it there is no dispute about that point.

Mr. McClennen: Seeing that advertisement in the newspaper, I imagine that Mr. Weber probably authorized that be put in. That is all I know about it, and nobody else authorized it.

The Court: That is not the point of your objection then?

Mr. McClennen: The point of my objection went to the other article particularly and I have no objection to its appearing that in the newspaper there was this advertisement. I disclaim its being attributable to anybody but Mr. Weber.

The Court: Objection overruled. I will receive them.

(Page of newspaper, previously marked as Plaintiff's Exhibit 884 for identification, was received in evidence.)

(Page of newspaper, previously marked as Plaintiff's Exhibit 885 for identification, was received in evidence.)

(Plaintiff's Exhibit 884 reads as follows: "Schine Pontiac to Open on Seven-day Basis.

Announcement was made this morning by Jacob Weber, [fol. 3577] Manager of Schine theatres in Ogdensburg, that starting Friday the Pontiac Theatre on Isabella Street will run full time.

Mr. Weber stated that now that the fall season is here it is felt that with the curtailment of outdoor activities opening the Pontiac will give the theatre patrons a choice of pictures at any time.

The operating policy will be the most liberal ever offered in this part of the country, he said. All programs will be double-featured, and the usual procedure will be that one picture will be one which has been brought back as an outstanding production, while the second feature will be a first-run. A selected program of short subjects will also be featured.

The admission price will also be reduced.

The opening features for Friday and Saturday are "Saturday's Children" and "Ride-em-Cowboy".")

(Plaintiff's Exhibit 885 reads as follows: "Schine's Pontiac, Ogdensburg, N. Y.

[fol. 3578] "Last Times To-Nite. R.K.O. Radio Pictures presents Lee Tracy 'Millionaires in Prison' John Wayne in 'Haunted Gold' 'The Mystery of a Ghost' plus 'Adventures of Red Ryder.' To-Nite Cash Jack Pot $20.00 Free. Bingo $20.00 Jack Pot. Always 14 sure winners.

(Starting Saturday, November 2nd this theatre will be open: Saturdays and Sundays open. Continuous Performance Both Days). Always two big hits—at bargain prices. Matinee on Saturdays, 15 cents—Evenings, balcony, 15 cents, Orchestra, 20 cents. Children under 12, ten cents, any time. Sunday and Monday—2 Ace Hits. 'Captain Caution'—'Gangs of Chicago.' (And some detailed description of these two pictures.)"

[fol. 3579] Mr. Wright: We have other volumes of the Journal, with respect to which we wanted to make some negative proof and I discussed the matter with Counsel, who agreed that we could handle this without the identification and offering of the Journal in evidence, by simply making a statement as to the contents.

The Court: Yes.

Mr. Wright: What we wanted to show by these issues, which are complete from October 26, 1940, the date of Exhibit 885, through the edition of January 31, 1941, with the exception of November 1st, 2nd, 3rd and 4th, and December 31, 1940, and January 1, 1941,——

The Court: The charges, you mean?

Mr. Wright: No, what we wanted to show was that the last date during that period on which an ad for the Pontiac Theatre appeared was, I believe, Saturday, December 14, 1940.

The Court: The defendant is willing to concede the date of the last publication, subject to the source, the question of the source?

Mr. McClennen: I said to Mr. Wright that there is, of course, no opportunity to consult this period at this time [fol. 3580] and that if he will give his personal assurance that that was the last advertisement within that period, with the exception of the papers not available, as he has described, that we would take that as the equivalent of the introduction of the newspapers themselves.

The Court: That stipulation is unnecessary to consider only the termination, that is all.

Mr. McClennen: That is all the newspapers there are here.

The Court: There are a lot of newspapers there. We have the last date. That's all.

Mr. McClennen: The last one that is here is January 31, 1941, and this is confined to the period from October, 1940, to January 31, 1941.

Mr. Wright: There is one qualification I would like to add to that. I say that the issue of Sunday, December 15, 1940, also appears to be missing here, and in addition to the showing that the last ad——

What did I say there before?

(The reporter read as follows: "Mr. Wright: No, what we wanted to show was that the last date during that period [fol. 3581] on which an ad for the Pontiac Theatre appeared was, I believe, Saturday, December 14, 1940.")

Mr. Wright: That the Pontiac advertised throughout the period from November, or from the date of Exhibit 885, that is, October 26, 1940, through December 14, 1940, and then did not advertise; there were no ads for the Pontiac after that date through January 30, 1941. Now, of course, this is based on a hasty check that we ourselves made this morning and, of course, if it appears on a further check that there are any inaccuracies, and what I say, I assume an appropriate correction can be made.

The Court: Are you concerned with the publications prior to the last publication? The question here is, in other words, on the statement made by both Counsel, seems to be the question of when the last publication was.

Mr. Wright: There isn't any doubt about that.

The Court: Do you want all the papers, all those dates, you mean, between these two dates shown?

[fol. 3582] Mr. Wright: Yes, in so far as—I stated the period for which we had the publications of the newspaper here, and then my statement was with reference to those newspaper publications, the dates on which Pontiac advertisements appeared and the period when they did not appear.

The Court: You said awhile ago that the question, this question, did not concern the question of charges or prices.

Mr. Wright: No, I was not offering it for that purpose. This was merely to show the discontinuance of the Pontiac operation during this period.

[fol. 3583] Mr. McClennen: That, of course, is not part of our agreement at all. The Pontiac was not discontinued.

Mr. Wright: I did not suggest that it was.

Mr. McClennen: I think you were a little inaccurate in your language. It better be corrected right away.

Mr. Wright: The purpose of the offer was not to show any particular admission prices. That is all.

The Court: Any cross-examination?

Mr. McClennen: No questions.

The Court: Next witness.

WILLIAM C. SMALLEY a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wright:

Q. Mr. Smalley, what is your occupation?

A. I am President and General Manager of the Smalley Theatres.

The Court: You have to speak louder than that.

Q. You have to speak louder so the Court and counsel can [fol. 3584] hear you.

A. Manager and President of the Smalley Theatres.

Q. Where do you live?

A. Cooperstown, New York.

Q. What business is the Smalley Theatres engaged in?

A. Theatrical business.

Q. Operation of motion picture theatres?

A. Yes, sir.

Q. Where?

A. Cooperstown, Stamford, Delhi, Walton, Sidney, Oxford, Norwich, Camden, Dolgeville, St. Johnsville, Fort Plain, Johnstown. Then I have two summer towns, that run three months a year.

Q. Which are those?

A. Hensonville, Sharon Springs.

Q. How long have you been engaged in the business of operating theatres?

A. About 30 years.

Q. Calling your attention to the year 1930, did you operate in Norwich then?

A. Yes, sir.

Q. When did you begin operations there?
A. It was November 4th.
Q. 1930?
A. 1930.
[fol. 3585] Q. What was the name of the theatre?
A. Strand Theatre.
Q. Were any other theatres operating in Norwich then?
A. Yes, sir, the Colonial Theatre.
Q. Who was operating the Colonial then?
A. Fox Theatres.
Q. During the 1930-1931 season, can you tell us what major film product you exhibited at the Strand?
A. R. K. O., Pathe First National, United Artists and Columbia.
Q. What did you have for the 1931-1932 season?
A. 1931-1932, I had all of First National, all of Warner and all of Columbia.
Q. For 1932-33?
A. 1932-33 I had a split with R. K. O., a split with Warner Brothers, a split with First National, a split with Columbia, a split with United Artists.
Q. When you say "a split" what do you mean?
A. I mean an equal split of half the pictures.
Q. The other half were played at the——
A. At the other theatre.
Q. Colonial?
A. Yes, sir.
Q. Then do you recall when Schine resumed operation of the Colonial?
[fol. 3586] A. I believe it was in the spring of 1933.
Q. Then, did your theatre burn down in 1932?
A. Yes, sir.
Q. When was that?
A. March 24, 1932.
Q. Was it rebuilt?
A. Yes, sir.
Q. And reopened by you?
A. Yes, it was a new theatre and reopened on November 10, 1932.
Q. Then was it renamed?
A. Yes, it was renamed the "Smalley Theatre."

The Court: Was that in 1932, did you say?
The Witness: 1932, yes, sir.

Q. Then, calling your attention to the spring and summer of 1933, did you see, or have any conversation with anybody with reference to licensing the Warner product for the 1933-1934 season?

A. Yes, sir, I saw Mr. Ray Smith, the Manager.

Q. Where did you see him?

A. In Albany.

Q. About when was that?

A. About June.

Q. What was said then?

Mr. McClennen: The usual objection.

[fol. 3587] The Court: Overruled.

The Witness: I just asked about the split——

The Court: What is that?

The Witness: I asked him if I was going to get a split of his pictures for the new season. He told me that he could not tell me anything about that, because that was done in New York.

Q. Then, did you see him later in the summer with reference to a product for Norwich?

A. Yes, he came to Cooperstown in August.

Q. What was said then?

Mr. McClennen: Same objection.

Q. About pictures for Norwich?

A. He came in and said that he was ready to sell me the new product, and so we went in and sat down and started talking over a new deal, and we went over several of my theatres and when he came to Norwich, I said, "What about Norwich?" He said, "Well, I can't sell you any pictures in Norwich." I said, "I need pictures in Norwich just as bad as I do in my other towns," and so we talked about the deal for a few minutes, and he said "Why, I will call up Andy Smith"—he was the salesmanager. So he called up Andy Smith, and he came back and told me that he could not sell [fol. 3588] me Norwich, so he would have to let the thing drop. I told him all right, and he went away, and that is all there was to it.

Q. Then, what other theatres were you operating at that time that you say you talked to him about?

A. Well, I was operating—I was not operating some of the theatres I am operating now. They were different small theatres that I turned over to small operators. I mean they

were different theatres than I named. I think there was the Sherburne I was running then, and the Hamilton.

Q. I just wondered about how many there were.

A. About 11 theatres.

Q. About 11 theatres you were talking about?

A. Yes, sir.

Mr. Wright: Mark these as the next exhibit number.

(Thereupon letter dated November 4th with enclosure, was marked as Plaintiff's Exhibit 886 for identification.)

Q. I will hand you this document marked Plaintiff's Exhibit 886 for identification and ask you if you received that with the attached document shortly after November 4th, 1933?

A. Yes, sir.

Mr. Wright: I will offer in evidence Exhibit 886.

[fol. 3589] Mr. McClennen: If your Honor please, in connection with the discussion yesterday morning, I desire, if your Honor will permit, to have it made a little more explicit on the record, when these communications, oral or written, between the outsider and the distributor are received in evidence by your Honor. I assume from what was said yesterday that it is with the understanding that they are received as communications and not as any evidence of the truth of the statements contained in them. I take it that this will serve as a good illustration. Here is a letter marked for identification Plaintiff's Exhibit 886, in which it is stated that all the pictures at Norwich of this particular company are under contract to the Schine Theatre. Of course, in many instances, it makes no difference, because the fact—and very likely in this case—the fact is shown by extraneous evidence, but I ask that this type of testimony and exhibit be received not as evidence of the fact as stated in the letter. That was under discussion yesterday morning [fol. 3590] with your Honor, and we ask your Honor to make that ruling, that is, that they are received only as the communications that took place and not as evidence of the truth of the things recited in the oral or written communications, because they are manifestly in that respect so far as we are concerned, merely hearsay, and that the receipt of the evidence be limited to the fact of the communication, and not to the fact declared in the communication, whether

it be an oral or written communication. I make the objection to this exhibit marked for identification 886.

Mr. Wright: The document is offered generally, your Honor, without restriction as to what may be the facts or not the facts. This is what Mr. Smith wrote at that time. If it is the truth, it is the truth. If it is not the truth, and contradicted by something else, then it is not true. In any event, that has nothing to do with its admissibility in evidence.

Mr. McClennen: The catch in that remark, if your Honor please, is "If it is contradicted by something else." Now, [fol. 3591] in the course of arguing to your Honor, Mr. Wright said, and it was read to you yesterday, that, of course, these were not offered as evidence of the truth of the statements contained in them——

Mr. Wright: That is not correct.

Mr. McClennen: But merely as to the communications that were made. I have been interrupted by the statement that that is not correct. I am referring to the statement that was read to your Honor yesterday from his position. Now, if he is offering these, and if they are received as hearsay evidence of the truth of the statement contained in them, we have one impressive objection. If they are received only as communications we have a less impressive objection, and it is time, I submit, that it be made perfectly clear whether your Honor is receiving these as evidence of the truth of the statements contained in them, or only as the communications which passed between the parties speaking and the party listening or the party writing and the party receiving the letter. The record should be clear on this, because I respectfully submit that if these are received [fol. 3592] as evidence of the truth of the statements made in them, there is an unanswerable objection to them, that we are having the facts proved against us by hearsay testimony, and I urge upon your Honor that the ruling determine whether these are being received as evidence of the truth of the statement contained in them or only as the communications which passed between the speaker and the listener, or the writer of the letter and the recipient of the letter.

Mr. Wright: If the Court please, in the statements that were made yesterday by me with reference to the reception of certain documents, merely to show that certain knowl-

edge was brought home or for other purposes not connected with the truth of the document, it was confined to inter-office memoranda. I said in some instances we would expect the document to establish the truth of the matter that appears on there, and others we were not interested in that precise question. In so far as these letters which are written to witnesses are concerned, there isn't any occasion at the time [fol. 3593] the document is offered for your Honor to attempt to determine whether or not the statements made therein are true or not. Certainly they are, I suppose, prima facie evidence of the truth of the facts that are being communicated if they are facts over which one who writes the communication is supposed to have accurate knowledge. Certainly there is no occasion for your Honor each time any of these exhibits is offered and received in evidence to make any ruling whatsoever as to whether or not what was said in the document is taken as true or false. That, of course, depends upon the view of all the evidence in the case.

Mr. McClennen: There is the precise statement. Of course, it is not necessary for your Honor to determine whether the facts stated are true or false, and no one paying attention to what I have just said could have inferred that I was asking anything of the kind, but here is the statement reiterated that this letter, if it goes in, is prima facie evidence of the truth of the statement contained in it. That [fol. 3594] does not call upon your Honor to determine whether it is true or false, but it does call upon your Honor to resolve the issue between us on this question of the significance of the evidence that is offered. We urge that a letter from an outsider to a distributor, or from a distributor to an outsider is not prima facie evidence of the truth of the statement contained in the letter, that it is no evidence whatever. Now, this is a very fundamental question and one that must be decided, I respectfully submit, by your Honor, and I ask your Honor to rule that these are not received as any evidence of the truth of the statements contained in them. I do not ask your Honor to find that the statements contained in them is false, but I ask your Honor to rule that the letter, if it goes in, is not even prima facie evidence, or any other kind of evidence of the truth of the statement contained in the letter. Now, I am either right or wrong in that contention, and if I am wrong, why your Honor's ruling will determine it. If I am right, I am entitled to have the [fol. 3595] ruling made.

The Court: The exhibit here purports to be a letter from the witness to one of the distributors, as I understand it.

Mr. Wright: No, if the Court please, it is a letter from the General Sales Manager of one of the distributors to the witness.

The Court: Oh, the theory on which a considerable part of the testimony has been received has been that these branch managers or officers occupy positions—general sales managers—were acting withiff the scope of their authority in the conduct of the affairs to which these letters relate. Standing alone, certain of these letters, such as the one here and other letters, there might be little significance. It has to be connected up, of course, all the time bearing in mind that the distributors represented by these officers are alleged co-conspirators. Of course, the paper itself, if it is received simply for the purpose of showing a communication under a certain date, that might mean very little, but if the Court is correct in its position that the acts of the general sales [fol. 3596[manager bind the company, then it seems to me what the sales manager has written or what he has spoken is competent to be received as some evidence of the fact. I cannot follow your reasoning unless our fundamentals are wrong. Of course, if the general sales manager, Mr. Smith, named here, had no authority to write these letters, to transact business in connection with the Norwich situation, then, of course, my foundation for the reception of this letter as evidence is false.

Mr. McClennen: I apparently have failed to make my position clear. I have no question that Mr. Smith, being the writer of the letter, had authority from Warner to write that letter. He had no authority to tell any one in the world for Schine that Schine had bought his pictures, and it is not binding upon Schine in any way, and it is not evidence that Schine had bought the pictures.

The Court: You waive aside the question of the conspiracy, it seems to me.

Mr. McClennen: I am making my contention and I am seeking your Honor's ruling on my contention. If my con- [fol. 3597] tention is sound, this letter, if it goes in, should be so limited that it is no evidence against Schine, that Schine had bought the pictures as stated in that letter. If I am wrong in my contention, I urge upon your Honor that you make a ruling—

The Court: I shall do that, and I think I realize the importance of the ruling. I might say this, in connection with this letter, this specific exhibit, that this witness has testified to the same facts that are purported to be set forth in this exhibit. He testified Smith told him—I think he did—am I in error?

Mr. Wright: The conversation he had was with Ray Smith, I think, the Branch Manager.

The Court: Oh, that is another Smith.

Mr. Wright: There are two Smiths.

Mr. McClennen: I am not speaking about this being an accurate statement of the conversation between this man and Warner. This presents an opportunity for a specific determination. If your Honor receives this in evidence, we ask you to rule that it is no evidence that, in fact, Schine had bought this Warner contract at this time. I dare say [fol. 3598] that the fact was so, but the difference is, this: If this letter goes in as prima facie evidence that we had made this contract with Warner, if it becomes at all important, we have got to go forward with evidence to show that we did not. If this letter does not go in as evidence that we have made that contract with Warner, then the plaintiff, if it is a material fact, must go forward with evidence to show that we had bought it. I conceive of no way in which to make this clearer, and it is a very important matter as we approach the time when we are called upon to introduce evidence. If these statements, hearsay as to us, are to be taken as truth of the facts stated in them, then there is one line of defense for us to take. If they are taken merely as I respectfully submit they should be, as evidence only of the communication that passed, then there is another line of defense to be taken by us.

The Court: What would be the reason for the introduction if they were offered simply to show that a communica- [fol. 3599] tion passed? To show the date or something?

Mr. McClennen: Why, I don't know what the reason would be. I had assumed that your Honor had received them so as to see what information Warner had at the time Warner acted in the way that it acted, and not as hearsay evidence of what we had done.

The Court: You go a little further when you say you assume it was offered to show that the information was brought to Warner on which Warner acted.

Mr. McClennen: And I am asking that it be limited to that, and not be taken as evidence that Schine had made that contract with Warner. The distinction is perfectly clear. I am right or I am wrong in that contention, and I urge upon your Honor that you rule on that position.

The Court: In taking that position the Government is placed in the position of having to show what was actually done by Warner in this respect.

Mr. McClennen: Was actually done by Schine.

The Court: Or by Schine—well, you say it is receivable [fol. 3600] as showing the information on which Warner acted. The next question is, how did Warner act?

Mr. McClennen: All I say is that this letter should be received as no evidence that Schine had that contract which Warner said that Schine had and——

The Court: Would it make any difference, assuming there is evidence to establish that there was a conspiracy? Would that make any difference in your position?

Mr. McClennen: No, I have stated my position which is that such a letter as this, conspiracy or no conspiracy, and waiving aside any question of whether there has been any evidence of any conspiracy at this time—I contend that in the present state of the evidence in this case, when this letter is offered, that this exhibit 886 for identification, if received, is no evidence that we had made—that Schine had made the contract with Warner therein stated. Now, if I am wrong in that contention, I take it your Honor will so rule, and my objection will be saved. I have taken a specific [fol. 3601] case, because it runs all the way through.

The Court: Yes, it runs all the way through.

Mr. McClennen: If I am right in the contention, your Honor in receiving it will receive it not as evidence of the fact that Schine had a contract with Warner. I have selected this as illustrative clearly and definitely of the distinction which we make, and urge upon your Honor that we have a ruling upon that question.

The Court: The same comparable situation would arise in respect to a large group of exhibits offered here, showing inter-company communications.

Mr. McClennen: It would arise in the case of many of those.

The Court: Yes.

Mr. McClennen: Of course, some of them are not letters in which anything is stated that Schine had done. Here is

something that it is stated that Schine had bought the Warner contract. Now, it furnishes a clear opportunity for us to know how we are to proceed in the defense of this case, and I urge upon your Honor to rule that this letter just received is limited so that it is no evidence that Schine [fol. 3602] had made the contract with Warner stated in the letter, and that if that is a material fact, then that fact must be shown in some other way.

The Court: Aren't these contracts available, Mr. Wright?

Mr. Wright: If the Court please, if your Honor should so rule at this time, I think your Honor would be clearly in error. I don't think there is any question at all about the propriety of the position that has been taken so far, that the communications made by the responsible officials of these distributors who are charged as co-conspirators with respect to the business they transacted with Schine, which is in issue in this case, is prima facie evidence of those facts that they set forth, whether they set it forth in a letter to one of these exhibitor witnesses, whether they set it forth in a letter to Schine or whether they record it as a part of their own records. I don't understand that there is any dispute at all among the authorities on that precise point. If your Honor were to now rule that these numerous com- [fol. 3603] munications that have been offered here with witnesses on the stand, with respect to which the point has not heretofore been raised, that, of course, would mean an entire recasting of our case. The consequences would be, as counsel pointed out, we would then, of course, seek to make other proof of those same facts. However, we don't think there is any necessity for such a recasting of our case, or furnishing additional redundant evidence to prove something is so which a responsible official of one of these companies has said is so with respect to his dealings with Schine.

The Court: In this particular case, of course, it is easy enough to produce the contract, is it not?

[fol. 3604] Mr. Wright: In that case there probably would be a contract, that is right.

The Court: It would show whether he had any rights.

Mr. Wright: That is true, but if we were going to be put now to a re-examination of all of the material which has gone in evidence here and determine in which instances we thought it was necessary to confirm or supplement a statement that had been made by one of these officials, as to what the facts were, we would then have to present a different

and considerably more extensive case than we have presented, and I submit it would be clear error to compel us to do so, because there isn't any question about the fact that these statements that these people made are at least prima facie evidence of the truth of what they are talking about.

The Court: You have offered in evidence many of these contracts made for pictures and it is easily producable, the contracts made by Warner with Schine for Norwich.

Mr. Wright: We have put numerous contracts in evidence, of course, and we shall put more in, but I submit [fol. 3605] that it is an entirely futile and redundant proceeding to put in evidence a contract to prove something that has already been established by other means.

The Court: Wouldn't it make your case stronger to have the document itself, showing what the terms were, rather than stated by an official of the company?

Mr. Wright: That, I suppose, is a question that occurs in every case that at some point there is a cut-off as to the extensiveness of the record or proof which we want to make. When we have competent evidence in the record of a certain fact I see no reason why we should then attempt to produce additional evidence of the same fact.

The Court: Of course, it is less conclusive upon the Court than the document itself would be. It might give less weight by reason of the fact you don't produce the contract.

Mr. Wright: Decisively a question of weight.

The Court: I give you an exception.

Mr. McClennen: If your Honor please, there was one thing that Mr. Wright said, which I want to refer back to. [fol. 3606] He said these things have been going on in this way. Mr. Rogers made it crystal-clear when this matter was up, and it is right there, read to your Honor yesterday, and I think the page is 286, I have it not before me, of the testimony, that these should not be received, these communications, oral or written, should not be received as any of the evidence.

The Court: Who do you mean made that statement?

Mr. McClennen: Mr. Rogers.

The Court: I don't question that. The point was raised all right. I thought you stated Mr. Wright made the statement.

Mr. McClennen: No, I said Mr. Rogers, and the reason I said it was because of Mr. Wright's statement, nothing that the Court has said, that this was going on in this way, and

I was recalling to your Honor's attention the fact that Mr. Rogers had made it last May or June.

The Court: Yes.

Mr. McClennen: And at that time this statement appears that of course these are not to be taken as evidence of the [fol. 3607] truth of the matters contained in them. Now, there is nothing at the present time——

The Court: What followed that statement by Mr. Rogers when made?

Mr. McClennen: Have you got that here?

Mr. Rogers: They have it here.

Mr. McClennen: I am speaking of this now, not with respect to what your Honor has done.

The Court: I want to know what the Court said at that time, with reference to the statement by Mr. Rogers; if the Court said it was received under those circumstances, under those conditions, why, the Court wants to know that.

Mr. McClennen: I understand it can be gotten here in a moment.

The Court: Have you other witnesses, Mr. Wright, to follow this?

Mr. Wright: This is the last witness, if the Court please.

The Court: Is this in reference to Norwich alone?

Mr. Wright: Yes, principally as to Norwich.

The Court: I want to step to the telephone just a moment.

(Short recess taken.)

Mr. McClennen: If your Honor please, the paper that [fol. 3608] was under consideration at the moment, on page 286, was an inter-office communication of one of the distributors. Mr. Rogers said: "May it please the Court, of course these letters cannot be accepted as establishing factually what is contained in these letters. That should be established by the plaintiff by competent evidence, and that is exactly why I objected to the admission of these letters. Mr. Wright: Of course they are not offered for that purpose."

Now, that is what I refer to.

Mr. Wright: Would you mind reading the rest of it?

Mr. McClennen: No, I would be very glad to read the rest of it, but what I referred to was the correctness of my statement of what Mr. Wright had said, and Mr. Rogers having made the assertion that these were not to be taken as any evidence of the truth of the facts in them. Mr.

Wright said "Of course they are not offered for that purpose." Mr. Rogers then continued: "If they are offered not for that purpose will you limit the purpose for which [fol. 3609] you claim they are offered?

Mr. Wright: They are clearly offered to show that Columbia could not and would not deal with this exhibitor until it had been unable to make the deal with the Schine Company and——

The Court: Your letters do not show that, do they?

Mr. Rogers: No.

Mr. Wright: The letter P-10 says very clearly 'We can make more money by selling Long here, get more money out of Long than they would get out of Schine', but Bissell's letter to Jackter says, 'We had to hold the deal up on account of Schine', and what these letters very clearly establish is that they were not able to sell——

The Court: Standing alone they would not show that. I will receive the letters, anyway. If they are competent for any purpose they are competent to be received."

That was said on the strength of what Mr. Wright had [fol. 3610] said, as I have read it to you, "Of course they are not offered for that purpose."

Now, that is what I am urging here, and there has been no change of position. That has been maintained throughout.

The Court: True.

Mr. Wright: If the Court please,——

The Court: I don't think it is necessary to go into that. I overrule the objection and receive the exhibits and give you an exception.

Mr. McClennen: You overrule my motion to have the effect limited so it shall not be taken as evidence of the truth of the matter stated in the letter?

The Court: Yes.

(The letter referred to, previously marked as Plaintiff's Exhibit 886 for identification, was received in evidence.)

Q. After you received this letter, Exhibit 886, did you have any further talk with Ray Smith?

A. Yes. Mr. Smith came down to Cooperstown again.

Q. That is Ray Smith you are talking about?

A. Yes, Ray Smith, the manager.

Q. Where did you see him there?

A. I saw him in Cooperstown, in my office.

[fol. 3611] Q. How long after you got this letter was this?

A. I would say two or three weeks.

Q. Then what was said then?

Mr. McClennen: If your Honor please, to avoid the misunderstanding hereafter, I object to the receipt of this, and I ask your Honor to rule that if received it is not as evidence of the truth of the statements made in the conversation.

The Court: I deny your motion and note your reasons for the objection, the grounds of your motion. Proceed. When was it?

Mr. Wright: Will you read the last question?

(Last question read by reporter.)

A. Mr. Smith come in and told me he couldn't do anything for me; that the product was gone and he couldn't sell me any pictures for that season.

Q. I show you this telegram, dated May 22nd, from you to A. W. Smith, Jr., and letter attached, dated May 24th, both 1934, from Smith to you, marked for identification as Exhibit 888, and ask you if you sent the telegram and received that letter, on or about the dates that they bear?

A. Yes, sir.

Q. And I will show you this letter, dated August 9, 1934, [fol. 3612] from you to Mr. Smith, Jr., and the reply dated August 9, 1934, from you to Mr. Smith, Jr., and the reply dated August 13, 1934, from him to you, both marked as Exhibit 887 for identification, and ask you if you wrote and received those letters, respectively, on or about the dates there?

A. Yes, sir.

Mr. Wright: I will offer these Exhibits 887 and 888 in evidence.

Mr. McClennen: If your Honor please, this question having been clearly presented, it will be constantly up and I hate to make a motion every time.

The Court: Yes.

Mr. McClennen: And the objection every time. May it be understood——

The Court: Yes, sir.

Mr. McClennen: —as to each of these communications heretofore received and hereafter received, communications

between an outsider and a company not Schine, a party to it,——

The Court: Yes.

Mr. McClennen: —that we persist in the objection and also in the motion that the letter or oral communication [fol. 3613] should not be taken as evidence of the truth of the matter stated in it, and that your Honor has overruled our objection and denied our motion?

The Court: Yes.

Mr. McClennen: And our objection is saved.

The Court: That is all that is necessary, it seems to me.

(Mr. Wright hands the letters referred, Plaintiff's Exhibits 887 and 888 to the Court.)

(The telegram and letter, previously marked as Plaintiff's Exhibit 887 for identification were received in evidence.)

(The letter, August 9, 1934, and reply, dated August 13, 1934, previously marked as Plaintiff's Exhibit 888 for identification were received in evidence.)

Mr. Wright: If your Honor has read them I won't bother reading them into the record.

The Court: Yes.

(Six papers were marked as Plaintiff's Exhibits 889, 890, 891, 892, 893 and 894 for identification.)

By Mr. Wright:

Q. Between the time you got this Exhibit 888 and Exhibit 887 did Mr. Ray Smith, or any other representative of [fol. 3614] Warner's call on you with reference to selling you a product for Norwich first-run?

A. No, sir.

Q. Then after you received Exhibit 887 what, if any, efforts did you make to license Warner Bros. pictures first-run in Norwich?

A. Well, when I was in Albany I would ask the manager if anything different developed. He would say "No, the pictures are sold." That's all I can do.

Q. With reference to the next season, that would be the '34-'35 season?

A. The same way. I wasn't able to buy any product in the next season either.

Q. And the same thing would be true with respect to 1935-36?

A. Yes, sir.

Q. '36-'37?

A. Yes.

Q. '37-'38?

A. Yes, sir.

Q. '38-'39?

A. Yes, sir.

Q. '39-'40?

A. Yes, sir.

Q. '40-'41?

A. Yes, sir, with the exception of once in a while I might [fol. 3615] get a rejected picture during those years. They would spot book or sell me one rejected picture, something like that.

Q. I am referring to season deals, either for a split or for a full deal.

A. No, I wasn't able to buy any.

Q. During that period was there any discussion of terms?

A. Terms?

Q. For Norwich; what you would pay or what you wouldn't pay?

A. No.

Mr. McClennen: This is as to Warner's?

Mr. Wright: Yes, as to Warner's.

A. Yes, as to Warner's.

Q. Then do you recall when a new method of selling was introduced under the consent decree?

A. I believe about '41.

Q. The fall of '41?

A. Yes.

Q. Can you tell the Court what change occurred in the method of selling Warner films at about that time?

A. Well, they sold their pictures in blocs of five or four, whatever it might be, a bloc of pictures.

Q. Beginning with the fall of 1941 and through the rest of '41, did any one from Warner's offer you or offer to discuss terms with you on any of those blocs that were [fol. 3616] then released?

A. Well, for my other towns, but not for Norwich.

Q. My question was with respect to first-run Norwich.

A. Yes.

Q. Was that true also with reference to 1942 through the month of May?

A. Yes, sir.

The Court: You mean by that you did not get the first-run up to May, 1942?

The Witness: No, sir.

The Court: What effort did you make after 1941, after the consent decree, what effort did you make?

The Witness: I tried the same way. I sent wires, letters, and everything.

The Court: All right.

By Mr. Wright:

Q. Going back to the year 1933, I will hand you this letter from Mr. Streimer, to you, dated June 27, 1933, marked Plaintiff's Exhibit 889 for identification, and ask you if you received that on or about that date?

A. Yes, sir.

Mr. Wright: We offer Plaintiff's Exhibit 889 in evidence.

(The letter referred to, dated June 27, 1933, Streimer to Smalley, previously marked as Plaintiff's Exhibit 889 for [fol. 3617] identification was received in evidence.)

Mr. Wright: Exhibit 889 is dated June 27, 1933, addressed to Mr. William C. Smalley at Cooperstown, "Dear Bill: Will you kindly see to it that play dates are submitted to us as soon as possible in accordance with the list I left with you showing the undated pictures in your various towns—not forgetting the Disney's.

I'd appreciate very much having this cleaned up before I leave for the Chicago convention, so that I shall be in a position to show that everything is dated.

I have taken the matter up with Mr. Lichtman regarding a split in Norwich on the new product and Al told me to work out a split with you when I got back from Chicago. At this time I might also advise that I received a telegram from Mr. O. L. Van Horne, representing himself as your attorney, concerning the new season's product for Norwich, and I replied to him by separate letter to this effect.

[fol. 3618] With kindness regards, Sincerely yours, United Artists Corporation, Moe Streimer, Sales Manager."

By Mr. Wright:

Q. Mr. Streimer was the manager at the New York Exchange?

A. Yes.

Q. Then Mr. VanHorne was your attorney at that time, was he?

A. Yes, sir.

Q. After you received this Plaintiff's Exhibit 889 did you see Mr. Streimer?

A. I didn't see Mr. Streimer until August.

Q. Where did you see him then?

A. At Utica.

Q. And who was present at that conversation? Who else was there, any one?

A. Mr. Streimer and myself.

Q. What was said then?

A. Mr. Streimer told me that Schine's had made a complaint to Mr. Lichtman that I had cut my admission prices in some of my towns and he said Mr. Lichtman was very sore about it and before I could discuss to split any more he had to see me to see what it was all about, and I told him it was very untrue, that I hadn't cut any admission prices, and I gave him my admission prices, and he took them back [fol. 3619] with him and he told me he would go back and try again, but he would appreciate it if I would write Mr. Lichtman in regard to the situation.

Q. I will show you this copy of a letter, dated September 5, 1933, from you to Mr. Lichtman, which has been marked for identification as Plaintiff's Exhibit 890. I ask you if that is a copy of a letter that you wrote Lichtman on or about that date?

A. Yes, sir.

Q. Then after you wrote the letter to Lichtman marked for identification as Plaintiff's Exhibit 890 did you have any further conversation with Mr. Streimer about first-run United Artists for Norwich?

A. Well, I called him up several times to see whether he could get the split for me and whether he could get me any pictures, and finally he told me, in December, he couldn't get me any, the pictures were sold. he couldn't get me any pictures.

Q. In the meantime had you written him the letter of November 2, 1933, which is from you to Mr. Streimer, and

received the reply attached, dated November 4, 1933, both of which are marked as Plaintiff's Exhibit 892 for identification?

A. Yes, sir.

Mr. Wright: We will offer Plaintiff's Exhibit 892 in [fol. 3620] evidence.

(The letter, dated November 2, 1933, and reply, dated November 4, 1933, previously marked as Plaintiff's Exhibit 892 for identification, received in evidence.)

Mr. Wright: Plaintiff's Exhibit 892 consists of a copy of a letter from Smalley to Mr. Streimer, dated November 2, 1933:

"Dear Mr. Streimer: We are asking once more for the opportunity to buy or lease from your Company an equal split of your 1933-34 product, as previously promised, for our Smalley theatre, Norwich, N. Y.

Very truly yours, William C. Smalley."

And the reply, dated November 4, 1933, from Mr. Streimer to Mr. Smalley, states: "Dear Mr. Smalley: Acknowledging your letter of November 2nd, please be advised only this morning we received a letter from the Schine Company, pursuant to our correspondence, concerning a split in Norwich, from which we are quoting below in full:

'In response to your letter of October 30, you are ad-[fol. 3621] vised that we are not in a position to give up a split of your product in Norwich, N. Y., in view of the fact that we have contracted for only such pictures as we actually need to operate our theatre. Signed J. Myer Schine.'

According to this letter you ought to be in a position to buy a lot of other product for Norwich. However, I'll keep after them so far as our own product is concerned and do everything I *can* possibly can to effect a split.

Sincerely yours, United Artists Corporation, Moe Streimer, Sales Manager."

By Mr. Wright:

Q. Then after you got that letter I just read do you recall about when the next time was you saw Mr. Streimer?

A. In December, he called me up and told me that the product had been all sold and he couldn't get me a split.

Q. Now I show you this letter, dated November 9, 1933, from you to Mr. Streimer, marked Plaintiff's Exhibit 893 for identification, and ask you if that is a copy of the letter you wrote to him on or about that date? In this letter dated [fol. 3622] November 11, 1933, from Mr. Streimer to you, marked Plaintiff's Exhibit 894 for identification, is that the reply you received on or about that date?

A. Yes, sir.

Mr. Wright: I will offer Plaintiff's Exhibit 893 and 894 for identification.

(The letter, dated November 9, 1933, Smalley to Streimer, previously marked as Plaintiff's Exhibit 893 for identification was received in evidence.)

(The letter, dated November 11, 1933, from Streimer to Smalley, previously marked as Plaintiff's Exhibit 894 for identification was received in evidence.)

Mr. Wright: Plaintiff's Exhibit 893 is a letter, dated November 9, 1933, from Mr. Smalley to Mr. Streimer, and it says:

"Dear Moe: I note that 'I'm No Angel,' 'Tugboat Annie,' 'Golddiggers,' and other pictures are playing Norwich four days, but your pictures such as 'The Bowery' are only playing two days.

I fail to see the drift of Schine's letter to you and your statement that although Schine bought all of your product [fol. 3623] there should be plenty left. Schine is not only demanding all of your product but he is demanding the product of every other Company, including Monogram.

I am today taking the matter up with the proper authorities in Washington, to see if *I see if* I shall have 50 per cent of the United Artists Pictures.

Mr. Rosenblatt informed me that I was to have an equal split of pictures from various companies until I had enough to operate my theatre in Norwich. I had already told him that you promised me 50 per cent of your product, but after receiving your last letter I shall, of course, have to refute this statement.

Very truly yours, William C. Smalley."

[fol. 3624] Q. Who was Mr. Rosenblatt?

A. He was the head of the motion picture theatres of the N.R.A.

Q. Administrator of the N.R.A. Code Authority?
A. Yes.

The Court: Mr. or Mrs. Rosenblatt?
The Witness: Mister.

Mr. Wright: Then, Exhibit 894, the reply, is dated November 11, 1933, addressed to Mr. Smalley. "Dear Bill: I have your letter of November 9th, and in reply want to advise that I am going to be in Gloversville on Tuesday of this coming week at which time I am going to try to force an issue direct with the Schines for a split in Norwich. I will advise you of the results of my efforts which I hope will be successful. With kind regards, sincerely, United Artists, by Moe Streimer, Sales Manager."

By Mr. Wright:

Q. And then, did you receive any further advice from him as to the result of his efforts?
A. Well, he called me in December and told me he could not get any pictures for me for Norwich.
[fol. 3625] Q. Then, I will show you this letter of August 9th, 1934, from you to Al. Lichtman, General Manager of United Artists, and the reply to you dated August 14th, 1934, both marked for identification as Plaintiff's Exhibit 891, and ask you if you wrote and received those letters on or about the date they respectively bear?
A. Yes, sir.
Mr. Wright: We offer Exhibit 891.

(Thereupon Plaintiff's Exhibit 891, previously marked for identification, was received in evidence.)

Mr. Wright: Mark these, please.

(Thereupon group of contracts referred to were marked as Plaintiff's Exhibit 895 for identification.)

Mr. Wright: Plaintiff's Exhibit 891 is a letter of August 9, 1934, from Mr. Smalley to Mr. Lichtman. It states: "On May 22nd, I sent you a telegram as follows: 'I desire to buy or lease at least 50 per cent of your 1934-1935 product for use in Smalley Theatre, Norwich, New York stop. Please have your representative contact me immediately.' Up to this date your representative has not called on me or com-
[fol. 3626] municated with me, and I again request that you have him contact me at once, because I desire to buy or

lease at least 50 per cent of your 1934-1935 product for Smalley Theatre, Norwich, New York. Very truly yours."

The reply dated August 14, 1934, states:

"We are in receipt of your esteemed letter of the 9th. We have an appointment in the near future to talk with the Schine Theatrical Enterprises who bought our product in Norwich last year. If we can arrange to sell you some of our pictures, at Norwich, we will be glad to do so. Frankly, we have an obligation for all the pictures to Schine, inasmuch as he bought them last year, also because they are good customers, and they usually buy our pictures for all their theatres. However, we will tell Mr. Schine at the time we negotiate with him of your desire to buy some of our pictures and all things being equal we would like to accommodate you. Just as soon as we see Mr. Schine, we will communicate with you either through Mr. Streimer or our Mr. [fol. 3627] Harry Gold. Thank you for your interest. Sincerely yours, United Artists Corporation." I believe that is A. Lichtman, Vice President and General Manager.

By Mr. Wright:

Q. I will show you these contracts clipped together with a tab "United Artists, 1934-1935", which has been marked for identification collectively as Plaintiff's Exhibit 895, and ask you if those are the contracts for the United Artists pictures that you bought for first-run in your theatre at Norwich during that season?

A. Yes, sir.

Q. The deal was made with whom representing the United Artists?

A. Well, part of the deal was made in November by Mr. Streimer, and the other part of the deal was made later on by Mr. Herman.

Q. The contracts dated in November, 1934, are those negotiated with Mr. Streimer?

A. Yes, sir.

Q. And those bearing the later dates of April, 1935, those were with Mr. Herman, the salesman?

A. Mr. Leon Herman.

Q. Then, did you play those pictures that year?

A. Yes, sir.

[fol. 3628] Q. Between the time you got the letter from Mr. Lichtman that I last read to you, letter of August 14,

1934, and November, 1934, had Mr. Streimer or Mr. Herman offered you any of those pictures?

A. Well, we had a deal going along right along, trying to buy the pictures, and in November we was able to buy them. I mean, it might have been one time or it might have been two or three times.

Q. Had they been offered to you prior to the time you bought them in November?

A. Yes, sir.

Q. What, if any, efforts did you make to buy or license the United Artists films first-run in your theatre at Norwich for the succeeding season? That would be 1935-1936?

A. I tried the same usual way, starting in as soon as the season opened, the buying season, and during the summer I probably saw Mr. Streimer two or three times in New York and once in Cooperstown.

Q. That is with reference to first-run of the 1935-1936 season?

A. 1935-1936 in Norwich, yes, sir.

Q. Do you recall what was said on those occasions?

A. Well, he told me that he was going to try to get me the product, because I had it the previous year, and he said [fol. 3629] certainly there would not be any reason why I would not receive a split if I did not get it all for the 1935-1936, but I never was able to buy any of them.

Q. You did not get a split?

A. No, sir.

Q. Or the season's product was not offered to you?

A. No, sir.

Q. Do you recall when you were told that you could not have a split of the product or all of it?

A. In December, up to the middle of December.

Q. About the middle of December, 1935?

A. Yes.

Q. Who told you that?

A. Mr. Streimer.

Q. Where was that?

A. That was in, I believe, in New York.

Q. Any one else present?

A. Well, there was probably—there might have been somebody in the office present, I don't know, outside of Mr. Streimer and me.

Q. What was said?

A. He just told me he had tried every way that he knew of, and he said that the deal, the Schine deal, had been handled by some one higher up, and it took it out of his hands, so he could not do anything else, who sold—it was [fol. 3630] sold as a circuit deal, and he was unable to do anything for me.

Q. Did you make any efforts to license the United Artists films for the 1936-1937 season?

A. Yes, sir.

Q. Season deal, that is?

A. Yes, sir.

Q. What did you do in that connection?

A. Well, I done practically the same thing, started in as soon as the picture season opened and tried to buy all the while, from then up to December.

Q. Were you offered a season deal?

A. I was never offered anything, with the exception sometimes they would offer me a foreign picture, one picture or two pictures from the foreign market.

Q. Was that true also with respect to the 1937-1938?

A. Yes, sir.

Mr. McClennen: Just a moment. These leading questions——

The Court: That is true.

Mr. Wright: Well, I will take him over it.

Q. What did you do with respect to the next season, 1937-1938?

A. I tried the same way for every year right up to 1942 without any success.

Mr. Wright: Mark these with the next exhibit numbers.

[fol. 3631] (Thereupon correspondence between Mr. Van Horne and Mr. Sauber, marked as Plaintiff's Exhibits Nos. 896 and 897 for identification.)

By Mr. Wright:

Q. Do you know whether this telegram, dated June 26th from Van Horne to Sauber, Manager of Universal, and the reply from Sauber to Van Horne, dated July 10th, 1933, were sent and received on or about the respective dates they bear?

A. Yes, sir.

Q. The Mr. Van Horne that is referred to there was the man who was your attorney at the time?

A. Yes, sir.

Q. And did you write and receive on or about the dates they bear, this letter from you to Nate Sauber, dated November 2nd, 1933 and the reply of November 4th, 1933, marked for identification as Exhibit 897?

A. Yes, sir.

Mr. Wright: We offer Exhibits 896 and 897 in evidence.

(Thereupon Plaintiff's Exhibits Nos. 896 and 897, previously marked for identification were received in evidence.)

Mr. Wright: Exhibit 896 is a wire from Van Horne to Sauber, Manager of Universal Film Exchange at Albany. [fol. 3632] "Smalley Theatres, desire the opportunity to buy or lease at least 50 per cent of your 1933-1934 product first-run for Smalley Theatre, Norwich, New York. Our percentage of product to be on an equitable basis."

The reply of July 10th, 1933, from Sauber to Van Horne states:

"Answering your telegram of June 26th, with regard to your request for 50 per cent of our 1933-1934 product for showing at the Smalley Theatre, Norwich, wish to advise that we are not in position to make available for sale any of our product. We are serving the Schine Theatrical Enterprises, who are now operating in Norwich under a franchise agreement which has been in effect since August 1st, 1931. This particular franchise covers all towns that are now operating or any additional theatres they might acquire during the life of our agreement. In accordance with the workings of this franchise, we have no alternative, but to make available to Schine's Norwich Theatre all of the product we intend releasing during the 1933-1934 season. [fol. 3633] Very truly yours, Universal Film Exchanges, by Nate Sauber."

Exhibit 897 is a letter dated November 2nd, 1933, from Mr. Smalley to Mr. Sauber. It states:

"We are asking once more for the opportunity to buy or lease from your company a reasonable portion of your 1933-1934 product for Smalley's theatre, Norwich, New York."

The reply, dated November 4th, 1933, states:

"Replying to your communication of the 2nd, again wish to advise that we are not in a position to offer your theatre

in Norwich any portion of our 1933-1934 feature product. If you will recall, we stated in our recent communication that Universal was tied up with Schines Theatres on a franchise agreement whereby we are obligated by the terms thereof to make available our feature product to all Schine theatres."

It is signed by Nate Sauber.

By Mr. Wright:

Q. I will show you this document previously marked for [fol. 3634] identification as Exhibit 422, a letter from W. F. Rodgers, or a copy of a letter from W. F. Rodgers, to William C. Smalley, dated July 20th, 1933, and ask you if you have made any search of your files to locate the original that corresponds to that letter?

A. Yes, sir.

Q. Have you been able to find the original?

A. No, sir, I was not able to find the original.

Q. Have you attempted to locate the letter of July 11th that is referred to in the first paragraph of that letter?

A. No, sir—during the N.R.A. I had all my letters——

Q. I don't think you understood the question. Have you attempted to locate the letter of July 11th?

A. I did try to locate it.

Q. Could you find that?

A. No, I could not.

Q. Do you have any recollection now as to whether or not you received the original of that letter?

A. I would not want to say that I received it, or I did not receive it, because I haven't the copy, or I haven't the letter.

Q. You don't recall at this time whether you got it or not?

A. I would not want to say.

Q. In the 1933-34 season what major product did you [fol. 3635] first-run for your theatre at Norwich?

A. 1933-1934?

Q. Yes.

A. I had Columbia and a split with R.K.O.

Q. Any others?

A. No, sir, with the exception of independents.

Q. Then for the 1934-1935 season, what, if any, first-run product did you have for the Norwich Theatre?

A. 1934-1935 I had United Artists.

Q. Any others?

A. No other, only slough pictures or rejected. That is the way they call them.

Q. What major first-run, if any, did you have there for the 1935-1936 season?

A. I did not get the question.

Q. I say what major first-run product did you have for the 1935-1936 season?

A. I just had a split of Columbia.

Q. Then for the 1936-1937 season?

A. I did not have any, only just rejects and slough pictures.

Q. For 1938-1939?

A. No major.

The Court: You asked about that before.

Mr. Wright: I am asking him now about what he had in the theatre. I had asked him before with reference to [fol. 3636] negotiations over this period with the companies.

The Court: He testified before after a certain date he did not have any first-run.

Mr. Wright: What was the last question and answer?

(Last question and answer read.)

The Court: 1941, he said, once in a while he got a reject. Go on,

Q. For 1939-1940 and 1940-1941, you had no major first-run, regular deal, either?

A. No deal, but just rejected pictures.

Q. And the same thing was true with respect to 1941-1942 through May, 1942?

A. Yes, sir.

Q. During the period when you had no regular season's deal with first-run major product at Norwich there, what, if any, efforts did you make to license such films other than those you have already spoken about with reference to United Artists and Warner?

A. Well, I sent a wire or telegrams and letters and practically the same that I did Warner's and United Artists, practically every year.

Q. Each season?

A. Every season, yes, sir.

Q. You talked to the Exchange Managers?

[fol. 3637] A. Yes, sir.

Mr. McClennen: This is objected to. It cannot be grouped in this way.

The Court: Objection sustained.

Q. Well, can you tell specifically, let us say with reference to R.K.O. now, when was the last year you had a split of the R.K.O. product?

A. 1933-1934.

Q. Then the next season did you try to license for 1934-1935?

A. Yes, sir.

Q. Whom did you talk to about that?

A. I talked to Mr. McEvoy and Mr. Halligan, and they told me that Schine had a deal for their product, and it was a selective deal, and whatever pictures they rejected I could have, and that is what I did receive, that is what I bought from that day right up to today, is all I ever received from R.K.O., is rejected pictures.

Q. With reference to Columbia, when was the last time you had a split of Columbia?

A. 1935-1936.

Q. Then, did you attempt to license pictures for Norwich for the 1936-1937 season?

A. Yes, sir.

Q. Whom did you talk to about that?

A. I think it was Phil Fox, Manager in Albany.

[fol. 3638] Q. What was said?

A. Well, I tried to——

Mr. McClennen: A little louder, please.

The Witness: —buy a product, or buy a split, but I could not buy it, that is all.

Q. Was there any discussion of terms?

A. Well, I offered the same terms that Schine or I paid before. I offered the same terms that I paid before, or Schine was paying.

Q. Can you tell us what, if any, efforts you made to get Metro product during the 1933-1934 season?

A. Well, I sent a wire. Of course, they always sent me back a very courteous letter that they had a good customer in Norwich.

Q. You had not used the Metro product there before?

A. No, sir, I never used any Metro.

Q. Then, from 1933-1934 through 1940-1941, was any offer made to you of a deal for Metro pictures there?

A. Why, I think, not for a deal. I had a few rejected over a period of years.

Q. I am talking about first-run in all these cases?

A. No.

Q. Then, when the new method of selling began in September, 1941, were you given any opportunity to license any Metro blocs?

[fol. 3639] A. No, sir.

Mr. McClennen: That is objected to.

The Court: Sustained. It calls for a conclusion. Strike it out.

Q. Did you have any conversation with any representative of Metro with respect to the blocs released beginning in August or September of 1941?

A. Yes, sir.

Q. Whom did you talk to?

A. I talked to Mr. Ripps.

Q. Who was he?

A. He was the manager of the Albany Exchange.

Q. Had you done business with him in your other towns?

A. Yes, I do business with him in all my other towns.

Q. What was your conversation that you had with him?

A. Well, he just—I just asked him about a picture. I says "What about a picture once in a while for Norwich out of some of these blocs." He just smiled and said "You know the situation. We have been over that for years." That is all there was to it.

The Court: Was there anything to prevent your bidding on these pictures?

The Witness: I didn't——

Q. Was there anything to prevent you bidding on these pictures after 1941?

[fol. 3640] A. I bid, but they just tell me that they have a satisfactory account, they don't want to change their account in Norwich. It wouldn't make any difference what I paid or bid, I wouldn't get the pictures. I could not buy the pictures.

Mr. McClennen: I ask that the last be stricken out.

The Court: Yes, the latter part may be stricken out.

Q. With reference to Fox, will you tell us what, if any, efforts you made to get Fox product first-run for your theatre in Norwich beginning with the 1933-1934 season?

A. Yes, sir, I tried to buy with wire or letter and conversation.

Q. Whom did you talk to at Fox?

A. Pardon.

Q. Whom did you talk to at the Fox Company? Whom did you have your dealings with?

A. I think at that time Grassgreen.

Q. What did he tell you?

A. Well, he told me that Schines had all the products bought, and they were a satisfactory customer, and that there was no pictures for sale for me.

Q. Then did they offer you a season first-run deal at any time during the seasons 1933-1934 through 1940-1941?

A. No, sir.

Mr. McClennen: That is objected to.

[fol. 3641] The Court: Strike it out.

Mr. Wright: What they offered, I think, is——

The Court: No, no, that is a conclusion. He may state what was said.

Q. Tell us, then, the talks, as nearly as you can recall them, that you had with Fox representatives after the 1933-1934 season that you have just referred to?

A. I tried every way to buy——

The Court: No, no, what you said.

Q. Just what was said as nearly as you can recall.

A. Well, I sent letters and wires to Fox——

The Court: No, no, what did you say to somebody and what was the reply as you remember it?

The Witness: I talked to Mr. Grassgreen, the Manager.

The Court: What did you say to him and what did he say to you, as you remember it?

The Witness: I asked him if I would be able to buy some Fox product, and he said, "No, you can only buy just the reject pictures Schine don't like," and that is all I could ever buy.

Mr. McClennen: I ask to have that last stricken out.

The Court: Strike it out.

Mr. Wright: I think he can say——

The Court: What he could buy is a conclusion. That is not proper.

[fol. 3642] Q. Is that all you ever did buy?

A. That is all I ever did buy, yes.

Q. Beginning with the new method of selling in the fall of 1941, did you have any conversations with the Fox representatives about licensing the films first-run for your theatre at Norwich in blocs?

A. Yes, I have tried to buy blocs——

The Court: What?

The Witness: I tried to buy blocs of pictures each year.

Q. State what you did.

A. In bloc, I tried to——

Mr. McClennen: I ask that it be stricken out.

The Court: It is not responsive.

Q. I called your attention specifically to the fall of 1941, when the small bloc sales began, do you recall whether you had any conversation with any representative of Fox with reference to those blocs that began to be released then?

A. Yes, I tried to buy a bloc.

Q. Whom did you talk to?

A. I talked to the Manager of the Fox Film Exchange in Albany.

Q. Do you remember who that was, or what his name was?

A. It was not Mr. Grassgreen. It was—I can't think of his name for the minute.

[fol. 3643] Q. Was it a fellow that you did business with in your other towns?

A. Yes.

Q. Can you tell us what was said?

Mr. McClennen: This is objected to because the witness characterizes this person as the manager of the Fox Albany Exchange, and not Mr. Grassgreen.

The Witness: Mr. Harry Alexander.

The Court: Just a moment. Can you tell whom you talked with?

The Witness: Yes, Mr. Harry Alexander. He was the manager at that time. It just slipped my mind.

Mr. McClennen: May that last be stricken, if your Honor please?

The Court: He talked with Mr. Harry Alexander. That is the man you talked with?

The Witness: Yes, sir.

Mr. McClennen: The rest may be stricken out, if your Honor please?

The Court: Yes.

[fol. 3644] By Mr. Wright:

Q. Did you know what Mr. Alexander's job was there?

A. He was manager.

Q. At Albany?

A. Yes.

Q. What was said?

Mr. McClennen: I ask to have it stricken out, if your Honor please. The evidence has been put in and it shows that Mr. Grassgreen was the manager at this time, and this witness obviously would not be able to know who was the manager, in the face of the Company's statement it was Mr. Grassgreen.

Mr. Wright: Could I see the record on that?

Mr. McClennen: Page 1369.

Q. Do you remember whether it was Grassgreen or Alexander, or who it was you actually talked to?

A. Mr. Grassgreen was manager and Mr. Alexander was in there the same time Mr. Grassgreen was, because Mr. Alexander became manager after Mr. Grassgreen went to Boston.

Mr. McClennen: I ask to have it stricken out, that characterization.

The Court: He didn't ask about that.

Q. At the time you had this conversation do you recall [fol. 3645] whether it was with Alexander or with Grassgreen?

A. Will you tell me what year you are talking about?

Q. I am talking about the fall of '41.

A. That was Mr. Grassgreen.

Q. When the new method of selling went into effect?

A. Yes, sir.

The Court: Who was it?

The Witness: Grassgreen.

Q. Did Mr. Grassgreen, or did Mr. Alexander, or anybody else, offer to you any of those blocs of pictures?

Mr. McClennen: That is objected to, if your Honor please.

The Court: Sustained.

Q. Can you tell us what was said?

Mr. McClennen: By whom?

Q. At these conversations you had.

Mr. McClennen: I object if it is "these conversations".

The Court: Sustained.

Q. Do you recall any particular conversation you had with respect to the blocs of films offered by the Fox Company in the fall of 1941?

A. When I was trying to buy—when I bought the product for my other towns I asked Mr. Grassgreen——

Mr. McClennen: That is objected to. All he was asked is if he remembered the conversation.

The Court: Do you remember the conversation about the [fol. 3646] bloc-buying, buying pictures in blocs, some time in 1941?

The Witness: I was unable to buy a bloc.

The Court: I know. But do you remember a conversation with some official in reference to that?

The Witness: I had a conversation with Mr. Grassgreen, the manager of the Fox.

The Court: All right.

By Mr. Wright:

Q. What was said?

A. I asked him if he would sell me a bloc of his pictures for Norwich. He said "No, the picture is already sold to Schine."

Q. Did you have any other conversation with him at that time?

A. Well, practically the same thing every time they come with a block of pictures. They sold five at a time.

Mr. McClennen: May that be stricken out?

The Court: Strike it out.

Q. You did talk to him each time there was a bloc of five released?

Mr. McClennen: Objected to.

The Court: Sustained.

Q. Just tell us when, after this first conversation, you had any further conversations with Mr. Grassgreen with

[fol. 3647] reference to Fox pictures for first-run in your theatre at Norwich?

A. Well, I bought—they sold the pictures in blocs of five and every time they offered me a bloc of five pictures for my other towns I tried to buy them for Norwich. I don't know what else I can say.

Mr. McClennen: I ask to have it stricken out.

The Court: Strike it out, not responsive.

Q. All you can say is what the conversations you had were, as nearly as you can recall them, if you can fix, first, the approximate dates when you had them.

A. After the consent decree went in 1941 I had conversations with Mr. Grassgreen and Mr. Grassgreen told me it was impossible to sell me any pictures.

The Court: That is the conversation you told us about before?

Q. That is with respect to the first bloc that was offered?

A. That is the first bloc.

Q. Did you have a conversation with respect to the next bloc?

A. Yes, I had a conversation.

Q. What was said then?

Mr. McClennen: This is with Mr. Grassgreen?

The Court: With whom was this second conversation? was this the same man, you mean?

[fol. 3648] The Witness: Yes, Mr. Grassgreen.

The Court: That would be when?

The Witness: That would be '41. I suppose he is talking about '41. Is that what you are talking about?

The Court: You told about the conversation in '41, with reference to buying a bloc. Now is this another one the same year?

The Witness: I wouldn't say whether the next bloc—I cant remember when the next bloc came out, but if it came out in '42 I had a conversation with him then in reference to buying pictures for Norwich, and I asked him if there were any pictures for sale for Norwich and he would say "No."

Q. Now can you tell us something about the general characteristics of your theatre at Norwich?

A. Why, it was built in 1932, Spanish type, and all modern, up-to-date equipment.

The Court: How many seats?

The Witness: 856, all on the lower floor, just one floor.

By Mr. Wright:

Q. Can you describe, generally, the Colonial Theatre there, with reference to size and age, if you know?

A. The Colonial Theatre was built in 1914.

[fol. 3649] Q. How large is it?

A. I think it is 1046 or 1044, 1046, I believe, and about 690 seats on the lower floor, and 356 in the balcony, I think is what it is.

Q. Was your theatre, and the Colonial Theatre, the only theatres that were operating in Norwich during this entire period you have been talking about, from '33 through '41?

A. Yes, sir.

Q. Norwich is the largest town in which you operate a theatre?

A. No, sir, Johnstown.

Q. And is yours the only theatre in Johnstown or is there another theatre there?

A. No, there is another theatre there, a small theatre.

Q. With respect to the other towns you have operated in, those are all one-theatre towns, are they?

A. Yes, sir.

The Court: What materiality has this?

Mr. Wright: I just wanted to give a general picture of the nature of his operations.

The Court: We are not concerned with the other towns. Let us not spend any unnecessary time, whether the others are one-theatre towns or not is immaterial, as far as I can see.

[fol. 3650] Mr. Wright: All I wanted to ask is for the size.

By Mr. Wright:

Q. Those were all towns of less than 4,000 people, were they, the other towns?

A. Yes, sir.

Q. Throughout this period you played the major product in the other theatres you had?

A. Yes, sir.

The Court: He stated that before.

Q. Can you tell us the general location of these other towns you operated in, with reference to the towns in which Schine operated theatres?

Mr. McClennen: If this is being dealt with for Norwich only, I object to this question.

Mr. Wright: If, what?

Mr. McClennen: I understood the Court's suggestion to be we were dealing with Norwich and I understood that this was the place that we were going into, and if so, it is wholly immaterial, the relationship between his other towns and Schine.

Mr. Wright: The complaint covers these features with respect to the other towns, if the Court please. There are allegations with respect to unreasonable clearance over [fol. 3651] towns in which he operated theatres, and I wanted to ask him where those towns were with reference to the Schine towns.

The Court: You are going to show none of these towns were within unreasonable clearance of Schine?

Mr. Wright: Yes, the Schine contracts, of course, will themselves show what the clearance provisions were, but the contracts will not show the locations of the towns over which Schine held clearance, that he operated with respect to the Schine towns. I simply wanted to ask him to locate his towns with reference to those Schine towns.

Mr. McClennen: If your Honor please, the reason I made the objection, Mr. Wright informed me that he was going into Norwich, that he was going to refer to the other towns, but my understanding of what he said—perhaps I misunderstood him—was that he was not going into the question of clearance in these other towns. We have no objection to his going into the clearance in these other towns, but we don't want just a little bite of it. We have got to cross-examine extensively on those if we are to go into them. [fol 3652] Now, if we are to go into them it is because of the clearance charges and we should know whether it is purposed to press with this witness the matter of the clearance charges. I inquired of Mr. Wright, with a view to the preparation to be made. We can go into the clearance all right but we ought to know whether that is a part of what this witness is to testify to and we ought not to be embarrassed by any saving of time when it comes to cross-examine on those subjects.

The Court: I don't want to spend any unnecessary time. If it isn't material he shouldn't go into it.

Mr. Wright: The statement I made to Mr. McClennen was that the testimony would be principally devoted to Norwich. I do intend at this time to cover with the witness any specific product negotiations with respect to any other town. We do expect to show that Schine, by means of the franchises and other circuit deals that it made, got unreasonable clearance in favor of its towns over town- in which [fol. 3653] this witness operated. We expect to show that principally by the contracts themselves. All that we are now offering to show by this witness and all that we propose to take him over on his direct examination is the relative positions, geographical locations, of these towns with respect to the Schine theatres.

The Court: I will let him locate these towns and, of course, — the question of clearance comes up he will be entitled to go into other towns.

State, as quickly as you can, where these towns are located.

The Witness: Only on clearance?

The Court: No, where are they located. That is all.

By Mr. Wright:

Q. Just give us the location of the towns where you operate theatres that follow Schine towns on major products and cover the town you follow and the distance between your town and that town.

A. Cooperstown is 23 miles from Oneonta; Delhi is 21 miles from Oneonta.

Q. You operate a theatre in Cooperstown?

A. And I operate the theatre in Delhi.

[fol. 3654] Q. Both of those follow Oneonta?

A. Yes, sir.

Q. Go ahead.

A. And then my Sydney theatre has to follow the Norwich theatre, which is 24 miles away.

Q. That is your theatre at Sydney?

A. Yes.

Q. That is 24 miles from Norwich?

A. Yes, sir.

Q. Any others?

A. Oxford is my theatre, which is eight miles away from Norwich, and that has to follow Norwich, and St. Johnsville.

Dolgeville is my theatre and St. Johnsville and Dolgeville, and they have to follow Schine's theatre in Little Falls, and Johnstown is a small theatre and that has to follow the Schine theatre in Gloversville.

Q. Those theatres you just named have all been operated by you during what period?

A. During 1930 up to today.

Q. From 1930 to date?

A. Yes.

Q. I don't belive you stated how far St. Johnsville and Dolgeville were from Little Falls.

A. St. Johnsville is, I would say, about eleven miles, [fol. 3655] and Dolgeville is about nine.

The Court: If this is going to take much longer we will have to adjourn. It is a quarter past 1.

Mr. Wright: I would say it would take another five or ten minutes.

The Court: We had better adjourn now until two o'clock.

(Whereupon a recess was taken until two o'clock P.M.)

[fol. 3656] After Recess, 2 o'clock P. M.

Appearances: As before noted.

WILLIAM C. SMALLEY, a witness resumed by and on behalf of the Plaintiff, testified further as follows:

Direct examination (continued).

By Mr. Wright:

Q. Mr. Smalley, how far is Johnstown from Gloversville?

A. I would say about three miles.

Q. Calling your attention to the month of May, 1934, did you have a conversation with Mr. Myer Schine at that time?

A. Yes, sir.

Q. Where?

A. It was May 24th.

Q. Whereabouts?

A. At Johnstown, New York.

Q. Where in Johnstown?

A. Johnstown is right next to Gloversville.

Q. No, I say whereabouts in Johnstown?

A. At the Johnstown Hotel.

Q. Who else was present if any one?

[fol. 3657] A. No one else was present.

Q. What was said at that conversation?

A. Well, Mr. Schine made an appointment with me to meet him at Johnstown in reference to ten pictures that was awarded by the N.R.A., and we discussed the 10 pictures——

Mr. McClennen: I ask that this be stricken out. What was said?

The Court: Yes.

Q. Tell us as nearly as you can remember what was said by him and what was said by you?

A. Well, Mr. Schine told me that he had the ten pictures that he was willing to reject to me, and I told Mr. Schine that I did not know whether I was going to accept them—the pictures or not, because I might appeal the case, and so then we went over the pictures again and talked about them, and then Mr. Schine said to me, he said, "Bill, why don't you sell me your Norwich Theatre?" And I said "Myer," I said, "why don't you sell me your Norwich Theatre?" And he says, "I am buying theatres; I am not selling them," and the discussion was that if I made up my mind to sell the Norwich Theatre or lease it, that I would let Mr. Schine know.

Q. Those pictures you were talking about were pictures for what theatre?

A. Norwich Theatre.

[fol. 3658] Q. Then did you ever at any later date let him know that you wanted to sell your theatres?

A. He didn't ask me about my theatres. He just asked me about Norwich.

Q. Your Norwich Theatre?

A. No, I never let him know.

Q. Then did anybody else from the Schine organization ever talk to you about buying any of your theatres?

A. Yes, sir, Mr. Willard McKay.

Q. When was that?

A. September 10, 1934.

Q. Nineteen what?

A. 1934.

Q. The date of the conversation ith Mr. McKay?

A. September 10th.

Q. Yes, but——

A. 1933.

Q. The year?

A. I told you——
Q. Where was the conversation you had with Mr. McKay?
A. Mr. McKay was 1940.
Q. What time in 1940?
A. It was May—September 10, 1940.
Q. 1940?
A. Yes.
[fol. 3659] Q. Where was that?
A. That was in Albany.
Q. Was any one else present there?
A. No, sir.
Q. What was said at that time?
A. Well, I met Mr. McKay at the Ten Eyck Hotel, and Mr. McKay invited me to Keeler's for dinner. We went down and had dinner, and in about 15 minutes Mr. McKay says "I am here to make a proposition with you for your circuit for the Schine Theatres," and I told Mr. McKay that I was not interested, and he said "Well, if you ever are, let me know."
Q. Is that all that was said then?
A. That is all — was said regarding the dealing, except we might be talking back and forth something.

Mr. Wright: That is all. Cross-examine.

Cross-examination.

By Mr. McClennen:

Q. In the early part of 1942, that is, before May 19, 1942, did you have some signboards with reference to your theatre between Johnstown and Gloversville?
A. I wouldn't know.
Q. By that do you mean that you don't know?
A. No, sir, I do not.
[fol. 3660] Q. Do you get to Johnstown from time to time?
A. Yes, sir.
Q. Were you there in the early months of 1942?
A. In Johnstown? Why, I might have been. I don't know.
Q. Well, have you any recollection of being?
A. No, sir.
Q. Do you have any recollection of traveling the road between Johnstown and Gloversville?
A. I very seldom ever go to Gloversville.

Q. Now, perhaps that will enable you to answer my question which is: Do you have any recollection of traveling the road between Johnstown and Gloversville?

A. No, sir, I haven't.

Q. You have no recollection of ever going over that road?

A. Oh, yes, I have been over the road.

Q. How often?

A. I would say maybe once a year, maybe, something like that.

Q. Well, then, you do recall going over that road perhaps once a year?

A. Yes, sir.

Q. For a number of years back?

A. Yes, sir.

Q. On any of your trips did you ever see a sign of which I show you a photograph?

[fol. 3661] A. Yes, sir.

Q. Was that sign*ed* erected by your theatre?

A. Yes, sir.

Q. And do you remember how long that sign was up before May 19, 1942?

A. No, I wouldn't.

Q. Well, you do remember that you had a sign on the road between Johnstown and Gloversville, do you not?

A. No, I didn't say that. I said I remembered those signs. I wouldn't know. The managers put those up, put up the billings. I wouldn't know where the locations were.

Q. Don't you ever remember seeing one of them up?

A. I have seen them in Johnstown, but I don't remember seeing one between Gloversville and Johnstown.

[fol. 3662] Mr. McClennen: I will offer the photograph referred to.

Mr. Wright: Has it been marked?

Mr. McClennen: No.

Mr. Wright: The photograph appears to be immaterial and certainly is not related to anything Mr. Smalley testified to on his direct examination.

Mr. McClennen: It is related to clearance which he testified to on his direct examination.

The Court: Let me see it.

(Mr. McClennen hands photograph referred to to the Court.)

Mr. McClennen: It is quite as material as the distance between Johnstown and Gloversville, which he testified to on his direct examination.

The Court: It relates to clearance, you say?

Mr. McClennen: Yes, if your Honor please.

The Court: Standing alone it does not. I thought you meant it had some necessary direct connection with clearance. I will receive it.

(The photograph referred to was received in evidence and marked Defendants' Exhibit D-138.)

Q. I show you another photograph of a sign. Did you ever see such a sign as that in North Arlington Avenue, [fol. 3663] Gloversville?

A. No, sir, I never did. I wouldn't know where North Arlington Avenue was.

Q. Did your knowledge of your Johnstown theatre ever go so far as to know that you were billboard advertising it in Gloversville?

A. No, sir. The manager takes care of that and puts out the billboards and puts up the posters. I wouldn't have time to go all over and check up where every one of those billboards was every time he changes it.

Q. Didn't you have anything to do with the policy of the operation of the Johnstown theatre?

A. Do I have anything to do with it?

Q. Yes.

A. Yes, I do.

Q. Did you approve of the idea of putting up billboards in Gloversville advertising the Johnstown theatre?

A. Well, I told the manager to take care of that himself. I didn't pay any attention to that. I gave him authority to put out billboards and put out posters.

Q. In Gloversville?

A. No, I didn't say in Gloversville. Any place he saw fit.

Q. Did you ever inquire where he put them up?

A. No, sir.

Q. Did you ever caution him not to put them up in Glov- [fol. 3664] ersville?

A. No, sir.

Mr. McClennen: I will offer this second photograph.

Mr. Wright: That is objected to.

The Court: It has not been identified by him as one of the signs, has it, irrespective of where it is put up?

Mr. McClennen: I think it would be arguable from the testimony thus far that he is subject to charge of responsibility for this sign.

The Court: No proof yet it was put up in Gloversville, or anywhere.

Mr. McClennen: What?

The Court: No proof yet it was put up anywhere. It bears a name?

Mr. McClennen: That is true. And I am appreciative of the caution of having these things proved directly.

The Court: Ask the witness. Why don't you inquire of the witness if it is one of the signs he saw put up in different places? Nothing to show yet.

Q. Is this, referring to this same photograph, the type of sign that was put up by your manager?

A. Yes, this is one of my billboards, if that is what you [fol. 3665] want to know.

Mr. McClennen: Well, I will offer this as one of his billboards, without the presence of any assertion as to where it was put up.

Mr. Wright: Same objection. There are two now just alike.

The Court: I will receive it. Of course, it is necessary to connect it up.

(The photograph referred to was received in evidence and marked Defendants' Exhibit D-139.)

Q. Clearance in favor of the Schine theatres in Gloversville over your theatre in Johnstown was of financial advantage to the Gloversville theatres, was it not?

A. I wouldn't know that.

Q. How long have you been in the business?

A. Thirty years.

Q. And you wouldn't know whether clearance in favor of the Gloversville theatres was of assistance to those theatres in their competition with the Johnstown theatres?

A. Oh, yes, I would say yes to that.

Q. That is, it was?

A. Yes.

Q. Of substantial advantage?

A. Yes, sir.

Q. Would it be apt to preserve to the Gloversville theatres patronage that might otherwise go to Johnstown?

[fol. 3666] A. Yes, sir.

Q. And the same thing is true with respect to every other one of the Schine theatres that you have mentioned that have clearance over your theatres?

A. I don't quite get that.

Q. It is of financial advantage to the Schine theatres in each of the localities that you have mentioned to have clearance over your theatre in the locality, is it not?

A. No, I wouldn't say that. In towns 23, 24 miles away, I wouldn't say it does.

Q. Does that clearance hurt your theatre in any way?

A. Well, it hurts me in booking.

Q. It hurts you in box office receipts?

A. No, booking pictures.

Q. It doesn't diminish your box office receipts a particle?

A. Not 23, 24 miles away, I would say not.

Q. So as far as box office receipts are concerned you have not been injured at all in those theatres by the fact that a Schine theatre has clearance over your theatre?

A. Oh, yes, I have been injured to the extent I am not able to book my pictures when I want to book them.

Q. That affects your box office receipts?

A. Yes, sir, it does.

Q. And it has the effect of having some of those patrons [fol. 3667] go to other theatres?

A. I imagine so, yes.

Q. And benefits those other theatres to that extent?

A. Yes.

Q. In your negotiations for pictures you seek clearance in favor of your theatres over other theatres in the locality, do you not?

A. Yes, sir.

Q. And you regard it as important to your business to have that clearance?

A. Well, not necessarily.

Q. If not necessarily, then possibly?

A. Well, if I didn't have it by way of Schine having clearance over me in another town and if I didn't have clearance over the other little town the other side of me, the other little town the other side of me would get the pictures before I do, because they would have an automatic clearance, which Schine has against me.

Q. And some of the theatres over which you have clearance are theatres that are not ahead of Schine theatres or open booking with them, isn't that true?

A. I don't quite understand that.

Q. Well, perhaps I will put it more simply then. You seek clearance for some of your theatres that are not in a vicinity of a Schine theatre, do you not?

[fol. 3668] A. Yes.

Q. And you get it?

A. Yes, sir.

Q. And you seek it because you think it will help your theatre in the competition with the theatre against which you have the clearance?

A. Yes, sir.

Q. It is a valuable part of the purchase of the picture to you, is it not?

A. Is it part of the purchase of the picture, did you say?

Q. I say, it is a valuable part of the purchase of the picture?

A. Yes, to a certain extent.

Q. In those theatres against which the Schine theatres have clearance you purchase, to some extent, by selective contracts, do you not?

A. In the towns where Schine has selective clearance?

Q. In towns over which Schine has clearance you have, in some of them, selective contracts, have you not?

A. Most all of them.

Q. Most all of them. And selective contracts which you have are contracts by which you have the right to select a certain number of pictures of the year's release?

A. Yes.

Q. And the prices are determined, in part, by the char-

[fol. 3669] acter of the pictures over which you have the right of selection?

A. Yes, sir.

Q. And the effect of those selective contracts is to give you the better part of the year's release of the particular company, without being obliged to take the whole of that season's release?

A. Yes, sir.

Q. Your circuit consists of about how many theatres, take it the first part of 1942?

A. 1942, fourteen.

Q. Fourteen. And in 1932 it was about the same number?

A. No, eleven.

Q. Eleven.

A. I believe that is what it was.

Q. Was that eleven after the Smalley theatre in Norwich had been built?

A. Yes, sir.

Q. Now, you have what you call a closed town in every one of those theatres except Norwich?

A. Norwich and Johnstown.

Q. Norwich and Johnstown?

A. Yes, sir.

Q. And in those towns which you call closed towns you do not buy all the product of any particular distributor, do [fol. 3670] you?

A. Well, I do from probably 25 per cent of the majors, of the big majors.

Q. Take it in general, in your closed towns do you buy substantially all the first-run product of Paramount?

A. Practically, yes.

Q. And of Loew's?

A. Yes, sir.

Q. And of Warner's?

A. Yes.

Q. And of RKO?

A. No, I wouldn't say. I didn't buy as many RKO.

Q. And of Fox?

A. What are you speaking of now? I mean are you speaking of the present time?

A. No, I am not speaking of the present time because we are not speaking of anything after May of 1942. Were you buying in that period of from '32 to '42 in your closed towns substantially all of Fox's product?

A. Well, I couldn't tell on that, no.

Q. Any recollection at all about that?

A. I think maybe one year I might buy it all, or 80 per cent, and the next year I might buy 60 per cent. My situation is I could only use so many pictures and I try to buy some from everybody, every major company.

[fol. 3671] Q. In those closed towns, as you call them, did you buy all or substantially all of the product of Universal?

A. No, sir.

Q. Or of United Artists?

A. Well, I might not buy the foreign pictures or the rejects, or something like that.

Q. But you would buy the regular line of United Artists?

A. Yes, sir.

Q. And Columbia, did you buy the full line in your so-called closed town, of Columbia?

A. No, sir, I think there were about four or five years I didn't buy any Columbia pictures. Maybe it was three years.

Q. In your closed towns?

A. In all of my towns.

Q. Which of the four or five years in which you did not buy any pictures of Columbia in any of your towns?

A. Might have been four or five; might be three or four. I am just guessing at that.

Q. Why did you say four or five? Was it in your recollection that that was fairly descriptive of the number of years you did not buy Columbia in any of your towns?

A. Well, it might be more or less.

Q. Might be more or less than four or five years?

A. Yes.

[fol. 3672] Q. You mean it might be as many as six years you did not buy any Columbia in any of your towns?

A. It could be, yes.

Q. What do you mean by "it could be"? Was it?

A. Well, I don't know.

Q. I wonder if you have any way of thinking it over and telling us whether you are not able, from your recollection, to say that there was no period of six years in which you bought no Columbia pictures for any of your towns?

A. No, I couldn't. I couldn't tell that.

Q. If it may have been six years in which you did not buy any Columbia in any of your towns, when were those six years?

A. When were the six years?

Q. Yes.

A. I would say from '37 to '42.

Q. That is, as your memory serves you now, from 1937 to 1942 you bought no Columbia pictures in any of your towns, is that correct?

A. No, I wouldn't say that.

Q. What did you mean by '37 to '42?

A. You asked me between what period that I thought.

Q. Yes.

A. I told you it was probably between that period and '42.

[fol. 3673] Q. That is the six years that you thought of were between 1937 and 1942?

A. I didn't say six years. I said four or five years, more or less, because I don't know.

Q. Do you also recall that you said it might have been as many as six years in which you did not buy any Columbia pictures in any of your towns? Do you remember saying that?

A. I might have said it.

Q. You don't even remember you said it within the last fifteen minutes?

A. I said I remember saying three or four or four or five years. I remember that.

Q. But you remember saying that it might have been six years, don't you?

A. Yes.

Q. And you remember saying that those six years might have been from 1937 to 1942; you remember saying that, don't you?

A. Yes, sir.

Q. And by that you meant to leave it that it might be that from 1937 to 1942, in those six years, you might have bought no Columbia pictures in any of your towns?

A. I didn't say that. I said I might have bought in not all of my towns. You were speaking of all of my towns.

[fol. 3674] I might have bought some Columbia pictures in some other towns and might have bought ten pictures in one town, twenty pictures in another town, and thirty pictures in another town. I didn't mean that they were left right out entirely, that I didn't have a Columbia picture running in any theatre.

Q. Do you remember saying there might have been a period, and it might have been six years long, in which you did not buy any Columbia pictures in any of your towns?

A. If I said that it was an error. I didn't mean it.

Q. You don't recall why you said it, do you?

A. Well, because you asked me the question.

[fol. 3675] Q. You answered it regardless of whether it was so or not, is that it?

A. Oh, no, I wouldn't say that.

Q. Why wouldn't you say that?

A. Because I wouldn't. I am trying to tell you to the best of my memory what I had.

Q. Well, is it the best of your memory that in the six years, 1937 to 1942, you did not buy any Columbia pictures for any of your towns?

A. No, I did not say that. I would not mean that.

Q. Is it the best of your memory that there never was a year from 1932 to 1942 in which you did not buy some Columbia pictures for some of your towns?

A. That is correct, I bought some pictures for some towns.

Q. But there were a good many of those years in which you did not buy Columbia in any of your towns except Norwich, is that true?

A. It might be, yes.

Q. It was, was it not, according to your recollection?

A. No, I say it might be. I couldn't tell whether I bought them for Norwich alone one year, and then maybe the same year I bought some for some other town. I can't remember that, that's all.

Q. In those closed towns if a distributor does not furnish pictures to you, that distributor has no opportunity that [fol. 3676] year to show that distributor's pictures in the town. That is true, is it not?

A. Yes, sir.

Q. And the distributors in their negotiations with you ordinarily negotiate with you for your entire circuit?

A. Yes, sir.

Q. And they strive to sell you as many pictures as possible in your closed towns?

A. Yes, sir.

Q. And they try to sell their pictures in the towns where there is buying competition to those exhibitors who will buy their full line product in that exhibitor's closed town, do they not?

Mr. Wright: May I hear that question.

The Witness: I would not say what they done in general. I wouldn't know anything about that.

Mr. Wright: What was that question?

(Question read.)

Mr. Wright: As to what the distributors try to do generally, I suppose, that should come from some distributor witness rather than from Mr. Smalley.

Mr. McClennen: What was the answer?

(Answer read.)

Q. With those exhibitors that you dealt with, at times you [fol. 3677] told them that you would not buy in some of your closed towns if they would not sell you first-run in Norwich?

Mr. Wright: I think you said exhibitors. I suppose you meant "distributors".

Mr. McClennen: Thank you. I meant distributors. Will you read the question with that correction?

(Question read.)

The Witness: Well, I bought all the other pictures for my other towns, but I couldn't get any pictures in Norwich, so that wouldn't make sense.

Q. That is a piece of information, but now if you will just turn your attention to the question and answer it.

The Court: Did you tell them that, that is the question, that you would not buy the pictures unless they sold you for Norwich?

The Witness: I might have told them that in order to get pictures.

Q. You might have told them that quite a number of different times in the ten years?

A. Oh, no, I wouldn't say quite a number of different times.

Q. Well, how many times should you say in your recollection that you had told them that?

A. If I didn't buy Columbia——

Q. No, how many times?

[fol. 3678] A. How many times? Well, I would say once.

Q. Why do you say once?

A. Because you asked me.

Q. Well, if I asked you twice, would you say twice?

A. Not necessarily.

Q. What?

A. Not necessarily, because you don't let me explain the question you are asking me.

Q. Well, you explain to me the question that I am asking you, will you?

A. You ask the question and let me hear it again. Let me hear the question again, please.

(Question read, as follows: "Q. Well, how many times should you say in your recollection that you had told them that?")

A. I might have told them that to get the pictures, but that didn't interfere me from buying in the other towns.

The Court: How many times, is the question, the number?

The Witness: Oh, I would say quite a few times, but I didn't word it in that way.

The Court: You answered the question.

By Mr. McClennen:

Q. When you built in 1932, the Smalley Theatre in Norwich, was that the first time that there had been by name a Smalley Theatre in Norwich?

[fol. 3679] A. Well, I called the old theatre the Smalley Strand, the one before it burned up.

Q. You mean the Smalley Strand bore the name on the outside of the Smalley Strand?

A. That is the way it was advertised, Smalley Strand.

Q. Wasn't it advertised as Smalley's Strand?

A. Because it was the Strand——

Q. I say, wasn't it advertised as Smalley's Strand, the name of the theatre being the Strand and the name of the operator being Smalley? Wasn't that it?

A. Yes, sir.

Q. And the first time that you named the theatre the Smalley Theatre was when you built it in 1932?

A. Yes, sir.

Q. When did you complete the building of the Smalley Theatre?

A. When did I complete it?

Q. Yes.

A. I opened it November 10th.

Q. What year?

A. 1932.

Q. Now, how long had there been no theatre in the town except the Colonial at that time?

A. You mean the difference between the fire and the time that I opened?

Q. The difference between the time when the Strand dis-

[fol. 3680] appeared in the fire and the time when you opened the Smalley, how long a time was that?

A. It was about seven months.

Q. About seven months?

A. Yes.

Q. And in those seven months, you had no occasion for any pictures of any distributor in Norwich, is that correct?

A. That is correct.

Q. At the time that the Strand burned, you had under contract enough pictures to have run the Strand for a good six months, had you not?

A. Yes, sir.

Q. When was the Strand built?

A. In 1919.

Q. And was it equipped for sound?

A. That I couldn't tell.

Q. Did you know anything about the Strand prior to 1930?

A. Well, I know the gentleman that operated prior—before Mr. Schine took it over.

Q. When was that?

A. I think Mr. Schine took it over in 1922.

Q. You had known of the operation before that?

A. I knew Mr. Ford, the man who operated it before that.

Q. From its condition in 1922, did you know anything about it until 1930?

[fol. 3681] A. No, I didn't know anything about it.

Q. The Strand Theatre had how many seats?

A. By golly, I forget. I don't remember.

Q. Well, see if you can't give us some idea. You know that your new theatre, the Smalley, had 856. How did the old Strand compare in seating capacity?

A. Well, when I took over the old Strand, I remodeled it, and reseated it, so I don't remember how many seats the old Strand had, but I could tell you how many seats I had after I remodeled it.

Q. How many seats did you have in 1930 after you had completed your remodeling?

A. I think it was 742, that is as nearly as I can remember.

Q. 742?

A. Yes, sir.

Q. Do you remember how many new seats you put in, that is, how much you increased the seating, if at all, in 1930?

A. No, I couldn't tell that.

Q. Was the theatre in operation at the time that you took it over?

A. No, sir.

Q. What time did you open it up?

A. Open up——

Q. In 1930, the Strand?

A. On the 5th of September, I think.

[fol. 3682] Q. On the 5th of September, 1930. How long had it lain idle at that time?

A. I wouldn't know.

Q. Weren't you in Norwich investigating before you acquired that theatre enough to get some idea of how long it had been idle?

A. The people that owned the theatre came over to Cooperstown, and I went and leased the theatre before I went—without going over and looking at it.

Q. You mean you never saw the theatre from 1922 until you took a lease of it?

A. I wouldn't say that. I might have been in it—in and out of it once or twice. I don't know.

Q. Before signing the lease of the theatre, how many times, then, recently, had you been in the theatre, the Strand Theatre?

A. Recently?

Q. That is, before you signed the lease under which you opened up in September, 1930?

A. I don't think I had been in it a year before that, I would say a year. It was a year anyway.

Q. Was it in operation the last time you were in it?

A. I believe it was, yes.

Q. Did you go there on an inspection tour, or just to go to the movies?

[fol. 3683] A. No, I just dropped in. I have a habit, when I go to a town, drop into a theatre and look over the back rail and walk out to see whether there is any business or not.

Q. Do you remember doing that in 1930 before you signed the lease?

A. No, I didn't go into the theatre in 1930 before I signed the lease.

Q. But perhaps the year before you signed the lease, you had been in the theatre and looked over to see how the business was?

A. Well, I just went in and glanced around. I had no reason to go into the theatre for anything, because I wasn't interested in the theatre whatsoever.

Q. You said you had a habit of going in to see how business was in the theatre?

A. I might go in a theatre here in Buffalo, and walk in and say "Hello" to the manager and look over the rail and see if there is any business in the house and walk out.

Q. You might do that sort of thing in Norwich?

A. Yes.

Q. The theatre was operating at the time you did this?

A. Yes.

Q. And it was running on second-run product at that time?

[fol. 3684] A. That I would not know.

Q. You mean with your knowledge of the theatre business, you would not know right away whether the product was first or second-run?

A. You are talking about something in 1929. For me to remember that I walked into a theatre and remembered whether it was second-run picture or first-run picture——

Q. Oh, you did not mean, then, that you did not know at the time. You meant you don't remember now whether it was running second-run?

A. Yes.

Q. Didn't you make any investigation before you took a lease as to the way in which that theatre had been operating?

A. No, the people came over and seen me, people that owned the building came over and saw me and asked me if I wanted to lease it. I said "No, I don't believe I am interested." They said Mr. Schine did not want it, or the Fox did not want it, and they asked me if I wanted to lease it, and I said "No, I did not think I was interested." They came back two or three times and finally they gave me a pretty good proposition and told me that they would put in some of the money and help fix it up and remodel it, and I said "All right," and I signed the lease with them [fol. 3685] before I ever went over and saw the theatre.

Q. Did they tell you anything indicating that it was a good theatre for you to take on beyond the fact that neither Fox nor Schine wanted it?

A. No, they told me, one of the things they brought out the most, at that time the Strand Theatre had some apartments in it and a couple of stores, and they said they wanted me to come over and run it, because the people were kicking over there. I said I would not be interested in that, that would not bother me any, and I said if I went over there I would want the house remodeled.

Q. Well, now, apart from the fact that the people were kicking and that Schine did not want the theatre and Fox-Metropolitan did not want the theatre, what else did they tell you about the theatre that seemed to make it a good proposition for you to take the lease on without looking at it?

A. Well, the lease they gave me, I thought it was a good proposition. After they told me they would pay for fixing it up and putting on a stage and so, I figured there must be four walls there, anyway.

Q. Where did you get the idea that it needed fixing up?

A. Pardon?

Q. Where did you get the idea that it needed fixing up?

A. Well, what I wanted was a stage more than I wanted [fol. 3686] anything else.

Q. Well, where did you get the idea that it needed a stage?

A. Because they told me they did not have any.

Q. What else did they tell you that made that an attractive type of theatre for you to get?

The Court: Is it essential to go into these details, Mr. McClennen?

Mr. McClennen: I am desirous of developing, if your Honor please, the type of house this was in the competition for pictures with the Colonial.

The Court: I think it should be done in a less roundabout way. I think we will save a little time by going right to it. He said he did not see the theatre prior to the time he bought it. He can describe the building. You asked him why he did not know there was a stage there and he said he was told that. You can ask him his knowledge of what the building was.

Mr. McClennen: I suggest to your Honor we are very much interested in the candor of this witness, and I should like to develop those things that might bear on it, but I will depart from the line on your Honor's suggestion.

By Mr. McClennen:

[fol. 3687] Q. Describe to me the condition of that theatre at the time you first went into it in 1930?

A. Well——

The Court: Go ahead and describe it. You ought to be able to do that.

The Witness: That is just what I was thinking. It had a booth in the middle of the auditorium. I remember that, and we took that out, and, of course, I don't know who owned the equipment, if Mr. Schine or whoever owned the equipment that was in there, that was taken out before we went in there, and what we done is redecorated the place and put on a small stage, Western Electric sound and fixed it up and went ahead. That is about all I can tell you.

The Court: Was this a large opening—had it been used for a picture show before?

The Witness: Oh, yes, there was a picture show in there.

The Court: Who did you say owned it before that?

The Witness: Mr. Layton.

The Court: You mentioned another name was the owner of operator.

The Witness: Mr. Schine.

The Court: When was that? When did Mr. Schine [fol. 3688] operate it?

The Witness: Mr. Schine had it, I think, from 1922 to 1929, when he sold out to Fox.

Mr. McClennen: If your Honor please, so that there may be no misunderstanding, he did not own it. Schine did not own it.

The Court: I did not know. It was operated by Mr. Schine from 1922 to 1929?

The Witness: When I went in there Fox was operating the Schine house, the Fox people, and this house was, that I went in, was the other house that—I don't know whether it had been closed or whether it was running. I wouldn't know that.

The Court: I thought he said Schine leased this particular house, the so-called Strand.

Mr. McClennen: If your Honor is inquiring for the fact?

The Court: Yes, I am inquiring from the witness.

Mr. McClennen: The fact is that the Schines operated as lessees from 1922 to 1929.

Mr. Wright: The witness so stated.

Mr. McClennen: The Strand Theatre. What?

Mr. Wright: As I understood it, that is what the witness said.

The Court: I just wanted to get it straight in my mind. [fol. 3689] At that time Fox was operating the other theatre?

Mr. McClennen: No, your Honor.

The Court: Do you mean Schine was operating both of them?

Mr. McClennen: Mr. Schine became the owner of the Colonial in 1921. He operated the Colonial and he operated the Strand as lessee from 1922 to 1929.

The Court: That answers my inquiry. Go ahead.

Mr. McClennen: And then Fox-Metropolitan operated both of them, both the Colonial and the Strand.

The Court: To the time the witness took over?

By Mr. McClennen:

Q. Is that correct?

A. I don't believe Fox ever run the Strand. I think the Fox just took over the Colonial.

Q. You mean you did not see the operation in the Strand Theatre after 1929?

A. I did not see the operation?

Q. You spoke of being in the Strand Theatre in 1929 and it being in operation?

A. Yes.

Q. Do you know by whom it was being operated at that time?

A. No, sir, I do not.

[fol. 3690] Q. Well, now, you were describing what you did to the Strand in 1930. Had you described all that you did?

A. Well, no, I haven't described. I might have put down carpets, or I might have painted the outside, or I might have done a lot of things. I don't remember exactly all the little details.

Q. Do you remember any big things?

A. Yes, I put in Western Electric sound. That was pretty big.

Q. Do you remember anything else?

A. I put in some seats.

Q. Do you mean the theatre was not equipped for sound at all when you took the lease?

A. No, sir.

Q. That is, it had never been operated as far as you knew up to the time you took the lease as a theatre with sound, that is, for sound pictures?

A. Not that I know of.

Q. So that at that time it was a brand new operation for it in the fall of 1930?

A. Yes, sir.

Q. That was the first time that it had ever operated with sound as far as you know?

A. Yes, sir.

Q. And by that time substantially all the pictures pro-
[fol. 3691] duced by the various distributors were sound pictures, were they not?

A. Yes, they was practically in 1930—some of them were half and half and some of them were a hundred per cent.

Q. Up to the time that you opened the Strand, there was no place in Norwich in which a distributor could have his sound pictures shown except in the Colonial?

A. That I would not know.

Q. Well, you never in any investigation that you made then or thereafter discovered any other place, did you?

A. I didn't know whether there was ever sound in the Strand Theatre or not when Mr. Schine run it. I didn't know anything about that.

Q. You never heard of there being sound in that theatre?

A. I don't remember, no, sir.

Q. When you visited the theatre there was no sound equipment in there?

A. I don't remember that. I remember going into the theatre and going through town on my way to Hamilton, and I just stopped off and looked the theatre over, that is all.

Q. So far as you were concerned, you took it up as a new proposition at that time?

A. As far as I was concerned, I put in sound when I opened up, if that is what you mean.

[fol. 3692] Q. You did not take on any existing good-will of anybody else?

A. No.

Q. You started a new proposition?

A. Yes, sir.

Q. You operated up to the time of the fire, a year and a half, about?

A. Yes.

Q. And at that time the Colonial was already running the first-run of the great bulk of the moving picture releases of the period?

A. They were running all of the first-runs, did you say?

Q. The great bulk, I say?

A. Great part of it?

Q. Yes.

A. No, I had quite a lot of product in 1930-1931.

Q. Well, now, for 1930-1931, the Colonial had Metro, that is, Loew's?

A. Yes, sir.

Q. Paramount?

A. Yes, sir.

Q. Fox?

A. Yes, sir.

Q. R.K.O.?

A. No, I had R.K.O.

[fol. 3693] Q. They had no R.K.O.?

A. Not as I know of.

Q. Did they have any Warner?

A. Yes, they had all of Warner.

Q. That included First National?

A. No, I had First National.

Q. That is, dealing with it in terms of Vitagraph, Vitagraph put out all the Warner pictures and all the First National pictures?

A. Not in those days, no. They were supposed to be partners, but they had different exchanges, and there were different salesmen and different contracts and different managers.

Q. And the Colonial had all of Warner?

A. Yes, sir.

Q. Did the Colonial have all of Universal?

A. I believe it did, yes, sir.

Q. Did the Colonial have all of Columbia?

A. No.

Q. Did the Colonial have any of Columbia?

A. That I don't remember. I had Columbia, but I don't know as I had a hundred per cent or not. I had——

Q. Did the Colonial have United Artists?

A. No, I had United Artists.

Q. Did the Colonial have any United Artists?

[fol. 3694] A. That I would not know.

Q. Now, of R.K.O., you had a split of the product in 1931 to the time of the fire, did you not?

A. No, I did not. I did not have R.K.O. I didn't have R.K.O.—I had R.K.O. 1930-1931, not 1931-1932.

Q. That is, you did not have R.K.O. 1931-1932?

A. No, sir.

Q. And when the 1932-1933 product was released you had no theatre in operation?

A. When the 1932-1933——

Q. Yes.

A. Was released?

Q. When that releasing season began, you had no theatre in operation?

A. Yes, I had a theatre in operation.

Q. When did it burn down?

A. It burned down March 24th.

Q. March 24th, 1932?

A. Yes.

Q. When the 1932-1933 releasing season opened, you had no theatre in operation, isn't that so?

A. The releasing season opened in the fall always, and 1932-1933 would start just about the time I opened my new theatre.

Q. You mean R.K.O. releasing season started in 1932-[fol. 3695] 1933 in November?

A. No, I wouldn't say November. I think they used to be in September.

Q. When did you open your theatre?

A. November 10th.

Q. What?

A. November 10th.

Q. Now, is it not pretty easy for you to say that when R.K.O. releasing season for 1932-1933 opened in September of 1932, you had no theatre in operation? That is true, is it not?

A. Yes, that would be true.

Q. Now, you say from 1931-1932, that season you did not have the R.K.O. product?

A. No, I did not have the R.K.O. product.

Q. And Fox-Metropolitan was then operating the Colonial Theatre?

A. Yes, sir.

Q. They showed in that season R.K.O. product?

A. Well, I imagine they did, yes.

Q. Then, for the 1933-1934 season, that was after Schine had re-acquired the Colonial and was operating it?

A. Yes, sir.

Q. And in that season you had one-half the R.K.O. product?

A. Yes, sir.

[fol. 3696] Q. That was more of the R.K.O. product than you had had since the 1930-1931 season, was it not?

A. I beg your pardon? I had a split of it the year before you are talking about.

Q. Then I misunderstood you. Didn't you say that for the 1932-1933 season you did not have the R.K.O. product?

A. No, I had the split in 1932-1933. I said 1931-1932. I said I did not have R.K.O. 1931-1932. I had a split 1932-1933.

Q. Then you had a split of the 1933-1934 R.K.O. product?

A. Yes.

Q. And a split was approximately 26 pictures?

A. Why, I imagine so, yes.

Q. And then of the 1934-1935 product you had 20 R.K.O. pictures?

A. They were the rejected pictures. I had no contract. I just took the pictures that were rejected by Mr. Schine.

[fol. 3697] Q. My question was whether you had them or not? Did you?

A. Yes, I had 20 RKO pictures.

Q. And you had, for the 1935-36 product RKO, 15 pictures?

A. I imagine. I am saying yes. I would have to check my records to be correct.

Q. Then the next year, the 1936-37 product, you had from 28 to 34 pictures, that is, not more than 34 and not less than 28, of the RKO product?

A. But I don't know as I got that many.

Q. That was your contract?

A. That was the contract I had.

Q. And for 1937-38 you got the same kind of a contract, that is, for not less than 28 nor more than 34 RKO pictures?

A. There is a clause in there——

Q. Did you get that contract?

A. I got some RKO pictures.

Q. And the provision there was that you should have not less than 28 nor more than 34?

A. Well, the provision was that Schine would have the choice.

Mr. Wright: It seems to me the simplest way to get at the provision is to offer the contract.

The Court: It is cross-examination.

Mr. McClennen: I was perfectly willing to do this. I thought this was so clear we could get it as quickly the [fol. 3698] other way.

The Court: He can state. It is cross-examination. He can state, if he knows.

Mr. Wright: As I understand it, it is perfectly clear from the contract what he got were the pictures that Schine rejected. If there is an attempt to show there was something else, all right.

Mr. McClennen: Mr. Wright, I am not cross-examining you. I am cross-examining the witness.

By Mr. McClennen:

Q. Is this contract dated September 7, 1937, approval date September 9, 1937, with RKO, the one that you refer to?

A. Yes, sir.

Mr. Wright: Is that one the producers produced?

Mr. McClennen: That is one Mr. Clagett—yes, it is from distributors' files.

Mr. Wright: It apparently was previously identified. I thought we might as well put it in under the same number.

Mr. McClennen: We might just as well give it a number. It is alone.

(The contract, dated September 7, 1937, approval date September 9, 1937, with RKO, was received in evidence and marked Defendants' Exhibit 140.)

[fol. 3699] Mr. McClennen: Defendants' Exhibit 140 is the contract just described in the questions to the witness, signed by Smalley Chain Theatres, Inc., W. C. Smalley, and the clause as to the pictures is: "Exhibitor agrees to use all pictures rejected by Schine, not to exceed 34 pictures or to be less than 28 pictures, if distributor produces 54 features as scheduled."

Q. What was the reason for inserting, do you recall, the top limit of 34 pictures in the contract?

A. What was the reason for that?

Q. Yes.

A. I wouldn't know.

Q. What?

A. I wouldn't know, what that reason was for.

Q. You knew why the figure 28 was inserted, did you not?

A. Well, Schine has the pick of all of those pictures there.

Q. You knew why the figures 28, was inserted, did you not?

A. I think there was a percentage figured out that I would get a certain percentage of the pictures and after Schine rejected so many, why, I would get a certain percentage of them. I think that was the way it was figured out.

Q. What was the percentage based on, do you remember?

[fol. 3700] A. No, I don't.

Q. You notice that this was based on a total production of 54 pictures, a split would have meant 27. Now, why was 28 put in as the number that you should be entitled to get?

A. 28 instead of 27?

Q. Yes.

A. I don't know.

Q. Now, in the case of Columbia you had some contract in every year from the 1936-37 season through the 1940-41 season, did you not?

A. Those were rejects. I had no contract, I don't believe.

Q. Didn't you?

A. I say I don't believe I had a contract.

Q. Don't you remember having a contract?

A. I think most of the—I might have a contract if they sold me three or four rejects.

Q. Do you mean to say you don't remember having a contract with Columbia in those years?

A. I had so few contracts with the majors.

Q. I am asking you about Columbia.

A. Well, Columbia is supposed to be a major.

Q. And therefore do you remember whether you had contracts in those years for Columbia?

A. I did the year I had the split.

[fol. 3701] Q. You had some contract with Columbia in every one of those seasons, did you not?

A. Well, I had—there might be a minimum contract. You can't make a contract up at the beginning of the season for pictures if you don't have them.

Q. Did you have some contract with Columbia in every one of those years?

A. I might have had.

Q. Don't you remember that you did have?

A. No.

Q. For 1935-36 is this Columbia contract, dated August 12, 1935, approved August 21, 1935, signed by you? Look at the signature. That is what I am asking you about. It is down at the bottom of the page.

A. Yes, but, by the way, you said on that other contract it was my signature and it was not. On the other contract you showed me it was "per". You did not read the "per", the one who signed it.

Q. Which was the "per" one? The RKO?

A. Yes.

Q. It was your contract, wasn't it?

A. Yes, but——

Q. Look at this and see if this is signed by you or by a "per"?

A. This is signed by me, yes. This is the year I had the [fol. 3702] split. I said I had a contract the year I had the split.

Q. All I was asking you was whether this was signed by you.

A. Yes, it was.

Mr. McClennen: I will offer that.

Mr. Wright: No objection.

(The contract, dated August 12, 1935, approved August 21, 1935, Columbia Pictures Corporation, was received in evidence and marked Defendants' Exhibit 141.)

Mr. Wright: That was what season?

The Court: '36-'37?

Mr. McClennen: That is '35-'36, if your Honor please. Now, this contract, Defendants' Exhibit 141, by Columbia, with W. C. Smalley, reads: "Total number of feature motion pictures offered 52; total number of feature motion pictures licensed 52."

Q. That was the contract that you made, was it not?

A. No, sir, I made an understanding I would release 50 per cent, before they would let me buy this.

Q. You agreed to take 52 pictures unless they chose to recall half of them?

A. Yes, that is right.

Q. And the contract that you signed and they signed was for 52 pictures, was it not?

[fol. 3703] A. Yes, sir.

Q. Then there was a separate agreement made, which is attached, is it not, to Exhibit 141?

A. Yes, sir.

Mr. McClennen: The attachment, if your Honor please, is in terms: "It is agreed and understood between both parties that Columbia Pictures Corporation shall have the privilege of withdrawing one-half of the 52 pictures from this contract sold to William C. Smalley of the Smalley Theatres, Norwich, N. Y., this date. It is also understood and agreed that the one-half of the product which shall be withdrawn will be determined by Mr. William C. Smalley of the Smalley Theatres, Norwich, arranging two even splits of the product, and the opposition theatre, which may buy the other one-half of the split shall have the privilege of selecting which split they wish to buy, or the opposition theatre may arrange the split and Mr. Wm. C. Smalley of the Smalley Theatre, Norwich, New York, will have the privilege of selecting which one-half of the product they shall retain."

[fol. 3704] The Court: It seems to be a sort of contradictory position, doesn't it? It gives one party the right of selection and then the other party the right of selection.

Mr. McClennen: No, if your Honor please, it gives Mr. Smalley first this opportunity to arrange the two blocs.

The Court: What do you mean by "arrange"?

Mr. McClennen: I mean to determine which picture shall go in one bloc and which in the other.

The Court: Where do they go from the bloc? Do you mean by that Mr. Smalley could select 26 out of the group or half of them?

Mr. McClennen: Mr. Smalley may determine which shall go in one bloc and which shall go in the other bloc and then the opposition theatre may determine which of those blocs it will take or——

The Court: You mean grouping half of them together and half of them together?

Mr. McClennen: That is exactly it.

The Court: And then select which bloc?

[fol. 3705] Mr. McClennen: The opposition selects which bloc they will take, and conversely, if the opposition determines what shall be in each bloc then Mr. Smalley has the choice of the blocs.

The Court: 50-50?

Mr. McClennen: 50-50.

Q. Now, when you made your contract for the rejects for the 1938-39 season, do you say that you offered to pay as much for the select pictures as Schine paid?

A. In 1938-39?

Q. Yes.

A. Whose product?

Q. Columbia.

A. Well, offered to pay whatever they asked. They asked a price.

Q. Well, you say you offered to pay what Schine was paying for the select product?

A. No, the understanding is that when they split the product if——

Q. I am not speaking of split product. I am speaking of the time when you made the contract for rejects.

A. Oh, rejects.

Q. At that time you say you offered to pay as much as Schine was paying for the select product?

[fol. 3706] A. Oh, no, I wouldn't pay as much for rejects as I would for selects.

Q. No, no. Don't you remember saying that you said that you offered, if you could have the select product, to pay as much as Schine was paying?

A. That is right.

Q. And at that time Schine was paying $125 a picture for the select pictures, was he not?

A. I don't know.

Q. You knew what you were offering to pay, didn't you?

A. I wouldn't know anything about what Schine paid for pictures.

Q. You just said, without knowing what Schine was paying, you would pay what Schine paid; is that it?

A. No, when they would come in to me they would say, "We certainly wouldn't sell you any cheaper than we would sell Schine", and I said, "That's all right. I will pay the same price."

Q. You did not inquire what that price was?

A. What was the use of inquiring what the price was?

Q. You did not inquire what the price was?

A. I inquired if they would sell me pictures.

Q. You did not inquire what the price was?

A. I did not inquire about the price.

Q. That is what I have asked you.

[fol. 3707] A. If I could get a picture to inquire about——

Q. You did not inquire about the price that Schine was paying at the time you had this talk about you would pay whatever Schine was paying, did you?

A. If I did inquire they wouldn't tell me.

Q. You didn't inquire, did you?

A. Certainly I did.

Q. You did?

A. Certainly.

Q. Did they tell you he was paying $125 a picture?

A. That I wouldn't remember.

Q. Did they tell you under preferred pictures, in the preferred bracket, he was paying $150 a picture?

A. I wouldn't know what they told me.

Q. You wouldn't know but what those were the figures that Schine was paying?

A. How would I know?

Q. You didn't know, did you?

A. No.

Q. And you got your pictures for $25 a picture, did you not?

A. I don't know. If I did I did. I don't know.

Q. Don't you remember anything about it?

A. About rejects?

Q. Or about the price of rejects?

A. Yes.

[fol. 3708] Q. Wasn't it $25?

A. I imagine that is right, about right, yes.

Q. And that was the price, the highest price, that you paid for Norwich to Columbia in any subsequent year?

A. I don't think that is true. You have got contracts that you just looked at that I paid over $100 for pictures in Columbia. You had a contract here a few minutes ago.

Q. After 1938-39?

A. On 1938-39, no. I didn't pay it to them because I didn't have the opportunity.

Q. I ask you whether it wasn't a fact that those you bought from Columbia or after you paid only $25 a picture?

A. I couldn't swear to that.

Q. Well, do you remember paying any more than $25 a picture after that date for any Columbia pictures?

A. I don't remember whether I did or whether I didn't. I paid whatever they asked me.

Q. Now, in buying pictures you have found, have you not, that you can sometimes get a better price out of the distributor if you don't hurry up too much in buying? Haven't you found that?

A. If I don't hurry up?

Q. Yes.

A. I will buy pictures in Norwich any time I can get them.

[fol. 3709] Mr. McClennen: Will you read the question?

The Witness: Are you talking about Norwich or talking about all theatres in general?

Mr. McClennen: I am talking about buying pictures that you are familiar with.

(Previous question read by reporter.)

A. Not necessarily, no.

Q. You never found that out?

A. Sometimes you do and sometimes you don't.

Q. You have found out, have you not, that when the season has progressed so far that you are the only available customer for the distributor that you can sometimes make a better trade on prices, have you not?

A. No, that is silly.

Q. What?

A. That is silly.

Q. You have found that to be silly, have you?

A. No, I say it is silly to make that statement.

Q. You have found it to be silly to wait until late in the season in buying, have you?

A. No, I never did wait until late in the season unless we had some argument about something, but I mean I wouldn't—of course today it is different when you are buying five pictures at a time.

Q. Oh, I was referring to the earlier time. You did not [fol. 3710] make your Columbia contract for the 1936-37 product until April 30, 1937, did you?

Mr. Wright: What product are you talking about?

Mr. McClennen: The Columbia product.

Q. That is a fact, isn't it?

A. '36-'37, for the '35-'36, did you say?

A. I said '36-'37 product. You did not make your contract for, you did not sign your application for, before April 30, 1937, did you?

A. Speaking about Norwich?

Mr. Wright: I submit the examination would be quite a bit fairer if he would be shown the contract.

The Witness: Speaking of Norwich or the towns?

Q. Speaking about Norwich.

A. Probably not, if I signed a contract, because they wouldn't know what pictures were rejected before that time.

Q. I show you contract of Columbia, approved May 6, 1937, purporting to be signed W. C. Smalley, by—can you tell me the name of the signer?

A. Tarbell.

Q. He was your manager?

A. No.

Q. Who was he?

[fol. 3711] A. He was a fellow who assists me in booking, that's all; a booker.

Mr. McClennen: I will offer that.

Mr. Wright: No objection.

(The contract, approved May 6, 1937, with Columbia Pictures Corporation was received in evidence and marked Defendants' Exhibit 142.)

Q. Now I call your attention to Defendants' Exhibit 142 and it is clear, is it not, that it is for twenty pictures, without any name or designation to the particular pictures, except they are of special feature attractions, group W-4, with the provision in the run and clearance, first run only on pictures rejected by the Colonial? Those are the terms, you see, of the contract?

A. Yes.

Q. And no pictures had to be rejected before you made that contract?

A. Well, it says right on there "rejected pictures", so I couldn't get them until they were rejected. It says right in your clause they were rejected pictures and how could I get them until they are rejected?

Q. What is there that stood in your way of making that contract in the fall of 1936 for 20 pictures, limited to be only those that should be rejected by Schine?

[fol. 3712],A. Well, I tried other ways to buy the pictures and I couldn't. All I got were the rejects.

Q. You referred to the efforts which you made to get pictures and correspondence with respect thereto. Did you receive a letter of June 3, 1940, from Leonard S. Picker of the Legal Department of Columbia, addressed to you, in the terms of what purports to be a copy of a letter?

(A pause.)

The Court: Can't you tell whether that is a copy of a letter received by you?

The Witness: I have to get down in it to tell whether I received it. I believe I received that letter. I think I have a copy of it.

Mr. McClennen: I offer that.

Mr. Wright: No objection.

(The letter, dated June 3rd, 1940, to Smalley, was received in evidence and marked as Defendants' Exhibit 143.)

(Mr. McClennen read Defendants' Exhibit 143 as follows:

"June 3rd, 1940.

Mr. William C. Smalley, Smalley Theatres, Cooperstown, N. Y.

DEAR MR. SMALLEY:

[fol. 3713] Your telegram of May 27th addressed to Mr. Abe Montague has been turned over to me for my attention.

I beg to advise you that the offer made by Columbia to you in the past, as repeated in a letter addressed to you by my associate, Mr. Moross, is once again repeated by me, namely —that Columbia Pictures Corporation is ready, willing and able to have its representative meet with you and discuss the licensing of an equitable split of our pictures to you provided you are prepared to pay a fair price for the same.

According to our records, Mr. Louis Weinberg, of our Sales Department wrote you on December 7th, 1939 that he would be glad to meet you at any place convenient to yourself if you would give him forty-eight hours notice, and I am certain that if you had a sincere desire to buy Columbia Pictures you could have found some time between December 7th, 1939 and January 4th, 1940 to meet him.

However, despite your failure to meet with our business representative, Columbia has made honest and sincere efforts to contact you and sell you a fair and equitable split, [fol. 3714] but at no time have you been willing to sit down with Mr. Weinberg to discuss same.

As you undoubtedly know, Mr. Weinberg is leaving today for the Columbia convention and will not be available to discuss this matter with you until June 18th, and if you are sincere in the statement you made in your wire of May 27th, you can make arrangements with Mr. Joe Miller, our Albany Branch Manager, for an appointment with Mr. Louis Weinberg for any time after June 18th.

Yours very truly, Leonard S. Picker, Legal Department.")

By Mr. McClennen:

Q. Did you receive a letter of November 13, 1939, addressed to Smalley Theatres, Inc., signed by Irving Moross, of the Legal Department, of which I show you what purports to be a copy?

A. Yes.

Mr. McClennen: I offer that.

Mr. Wright: No objection.

(The copy of letter, dated November 13, 1939, signed by Irving Moross, to Smalley Theatres, Inc., was received [fol. 3715] in evidence and marked Defendants' Exhibit 144.)

(Mr. McClennen read Defendants' Exhibit 144 as follows:

"November 13, 1939.

Smalley Theatres, Inc., Cooperstown, N. Y.

Attention Mr. W. Smalley

Gentlemen: Your letter November 7th, addressed to Mr. A. Montague, has been turned over to me for reply. Upon investigation of your complaint I find that the same is entirely unfounded as for a number of years past we have offered to you at least one-half of our product for exhibition in your theatre in Norwich. Our offer to you has been on

fair and reasonable terms. In each instance you have declined to accept such offer and have made a counter-offer in terms so low that the terms were not acceptable to us. I would be very happy to have our representative meet with you and discuss licensing of a split of our pictures to you provided you are prepared to pay a fair price for the same.

Yours very truly, Irving Moross, Legal Department.")

[fol. 3716]. Q. Of the 1936-1937 product, did the Columbia Company have a lot of trouble with your circuit in procuring datings and liquidating of the 1936-1937 product?

A. I wouldn't know that.

Q. You don't remember anything of that?

A. I remember there was some deal where at the end of the season we bought some pictures for the next year to wash up the following delinquency on the previous year, that's all I remember, there was some kind of a deal on it.

Q. When the releasing season came to the end, you were behind on the playing of the product that you had of that season?

A. Well, there was some pictures there that we did not care to play, and it was understood with the Columbia people that they would rechange them for some others on the new season.

Q. And they, you remember, were urging you before the end of the season to play up those pictures, and you said you did not want to play them?

A. I said I did not want to play them?

Q. Yes.

A. There is a lot of pictures I don't want to play, but I have to.

Q. What I said was, you said to them that you did not [fol. 3717] want to play those pictures?

A. I don't recollect that.

Q. You recollect within the last three minutes saying that there were certain of those pictures that you did not want to play?

A. Yes, I said that.

Q. Didn't you tell them you did not want to play them?

A. Well, I would have to play them if they don't——

Q. Didn't you tell them you did not want to play them?

A. No, I did not tell them in that way.

Q. Do you know how they found out that you did not want to play them?

A. They exchanged them for some other pictures.

Q. Do you know how they found out that you did not want to play them?

A. They probably wrote me a letter and told me about it, is all I know.

Q. Now, you referred to a complaint that was made about your low admissions. Do you remember your testimony this morning on that subject?

A. Yes, sir.

Q. Having cut——

A. Yes.

Q. As early as 1934 you had cut admission prices for children at matinees down to 5 cents, had you not?

[fol. 3718] A. I think we run a couple special matinees for children. Never was no regular price.

Mr. Wright: Where was this? I did not hear the town.

Mr. McClennen: 1934.

The Witness: Is this supposed to be Norwich?

Mr. McClennen: Norwich.

Mr. Wright: Is this Norwich?

Mr. McClennen: This is Norwich.

Q. You advertised in the town five-cents admission for children?

A. That was just for special matinee.

Q. You did advertise it, did you not?

A. I might have put it on——

Q. Don't you know that you did?

A. I imagine I did.

Q. Why say you might have when you know that you did, did you not?

A. If you had an ad of it I did, yes.

Q. Then again in 1934, you put in that same ad, did you not?

A. Well, I couldn't tell how many I put in, or I couldn't tell how many of those special kiddie matinees I ran. I don't remember.

Q. You advertised in 1934 that five-cent admission for children matinees a number of times, did you not?

A. I wouldn't know how many times that I advertised it.

[fol. 3719] Q. You remember that it was a goodly number of times, don't you?

A. I remember it was two or three times.

Q. And then you repeated that same thing in later years, did you not?

A. That—I don't know that, no.

Q. Then you advertised free tickets to students, did you not?

A. Free tickets to students?

Q. Yes, that is exactly what I said, free tickets to students?

A. No.

Q. You advertised them, did you not?

A. I never run any free shows.

Q. What?

A. I never run any free tickets that I know of.

Q. You never advertised any free tickets to students?

A. Unless there was some catch in it, I don't know.

Q. You mean to say they could not get in even if they tried it?

A. Oh, no, I don't mean that, but I mean, there must be some catch in your paper you have there or something.

Q. Did you ever see any of these tickets that I show you?

(Handing to witness.)

The Court: What is your answer? Did you see these [fol. 3720] tickets?

The Witness: Yes, sir, I have seen those tickets.

Q. And did you issue tickets to children at five cents?

A. I have already stated we had kiddies' matinee. I don't know what tickets we used for the kiddies' matinee. There is no price on those tickets.

Q. Did you ever see any of these which I show you bearing a stamp date of October 25th, 1939 on the reverse side?

A. Yes, that is a kiddie matinee.

Mr. McClennen: I offer that.

Mr. Wright: This is objected to on the ground it is immaterial to any of the issues here that are being tried.

The Court: What does it purport to be?

Mr. McClennen: This purports to be a free ticket good for all students.

Mr. Wright: That has nothing to do with the direct-examination.

The Court: Overruled.

(Thereupon ticket purporting to be a free ticket to students, was received in evidence and marked as Defendants' Exhibit D-145.)

Mr. McClennen: This is a card about three or four inches long, two inches wide, saying: "Smalley's Norwich Theatre, [fol. 3721] special morning matinee, Saturday, October 21st, at 10 A. M. Big triple show. Hit No. 1, from the famous Sunday comic strip, Dick Tracy's G-men. Hit No. 2, Gene Autry, "Smiley Burnette," "Home on the Prairie." Hit No. 3, Jack London's famous story "Mutiny of the Elsinore." This is positively one of the greatest kiddie shows ever to play in Norwich. Notice: Be sure to bring this ticket. You may get in free. Good for all students."

By Mr. McClennen:

Q. You say that one of the distributors told you that a complaint had been made about your reducing prices, do you not?

A. Well, if that is what I said, that Schine made the complaint.

Q. You told that distributor that you had not reduced prices?

Mr. Wright: I think the Court's attention should be called to the fact this is 1939, and that conversation that was testified to in the direct testimony occurred in 1933, a six-[fol. 3722] year difference. Obviously this testimony as to this matinee has no relevancy to that conversation.

Mr. McClennen: Is this by way of objection to my question, or just argument to bring to the attention of the witness?

Mr. Wright: It is by way of additional objection to your offering this ticket, as to what happened in 1939 which was not covered on direct, which has nothing to do with the direct-examination and is improper cross-examination.

The Court: No mention has been made of the date.

Mr. Wright: On this ticket.

The Court: The point is your remark to the Court might call attention to some specific date. I don't know what may follows.

Mr. Wright: I understood it had a date on it. There is a date on the back, October 25th, 1939.

The Court: Yes, I have seen it. Go ahead. It may be connected up with some reduction of prices, on the date the reduction was made.

By Mr. McClennen:

Q. A few minutes ago you stated that you had never issued any free admission tickets, did you not?

A. Well, that——

[fol. 3723] Q. Do you remember that you stated that a few minutes ago?

A. Yes, I made that statement. That is not an admission ticket there. That is not a ticket.

Q. What?

A. That is not a ticket. I probably would not run another 10 o'clock matinee again in five years. I just give the kiddies a treat once in my life. I had a right to do that, if I wanted to.

Q. You advertised free admission to students, did you not?

A. To children in the morning.

Q. To students, did you not?

The Court: The paper shows, I think, Mr. McClennen.

Mr. McClennen: Well, if your Honor please, the witness testified that he never did such a thing, and I am trying to get him to admit that he did.

The Court: He had admitted they issued these tickets here. We may conclude what that is from what it states.

Mr. McClennen: I was pressing as a cross-examiner in the hope that the witness would be willing to admit that he had made a mis-statement on the witness-stand in view of what I have shown here. If your Honor thinks I should [fol. 3724] not press it further, I will not.

The Court: There is already testimony here that he did not change his prices. You claim this to be in contradiction of that. We have to get through with this witness today. I have to get away soon, or we will have to keep the witness over until Friday.

Mr. Wright: If the Court please, there is a witness here that I have with some documentary material from the United Artists whom we told we would excuse today. It is just a question of identification of documents, and I would like to interrupt and put him on if this is—if the examination is not going to be finished today.

Mr. McClennen: I should hope the examination would be finished today.

The Court: You think so?

Mr. McClennen: Of this witness?

The Court: Yes.

Mr. McClennen: I hope so.

The Court: I don't know how long you will be. Don't misunderstand me. I don't want to curtail you in your examination. The only point is, if we don't get through today, [fol. 3725] we have to go on Friday, that is all.

Mr. McClennen: I am ready to do whatever suits the convenience of the Court. If I should suspend with this witness now, I am perfectly willing to do so, but I think I can finish today if I am not interrupted, and still leave time for this witness to take the stand to identify documents, but I am perfectly willing to do whichever is wanted.

The Court: You better proceed now. Proceed.

By Mr. McClennen:

Q. What was your admission price, your advertised admission price at your theatre at this time?

A. At which time now?

Q. At the time when these free tickets to students were issued, what was the admission price of your theatre at that time?

A. I couldn't tell you offhanded.

Q. Was it 10 and 20 cents?

A. You mean 10 and 20 for—I never run for 10 and 20 cents at night.

Q. Apparently you can tell us this much about it. Can't you tell us what your admission prices were?

A. They have never been 10 and 20 cents at night. I know that.

[fol. 3726] Q. What have they been?

A. They have never been below 25 cents.

Q. Never been below 25 cents at any time?

A. If you bring out something that might happen once every four or five years, like you did on this morning show, there might have been a benefit or something like that. I might give some benefit, five cents on a ticket or ten cents on a ticket, I don't know, but my regular run of admissions has never been below 25 cents.

Q. Do you recognize this photograph as of a display ad of yours?

A. Well, that still would not be 22 cents.

Q. Does that mean that you do recognize it or don't?

A. What is that?

Q. I asked you if you recognized that——

A. It says "Smalley's Norwich Theatre." I couldn't tell you where this is, but I am reading what it is, but that probably included tax—22 cents net and 3 cents tax would be 25 in those days.

Q. Do you recall that in January, 1942, you had display signs saying "Smalley's Norwich Theatre, the most entertainment for the least money, prices 10-20 cents"? Do you remember having those?

A. It don't say that.

Q. Do you remember having such as I have just said?

[fol. 3727] A. I say that it looks like one of my signs. I don't know anything about it. It don't tell me where the location is or where it is or what it is. You come—it looks like a banner or something, but it has got "Smalley's Theatre" on, so it must be a picture of one of my advertisements. I don't know.

Mr. McClennen: I offer that.

The Court: You read the word "Norwich", didn't you?

Mr. McClennen: Yes, your Honor.

Mr. Wright: We have the same objection that we had to the other.

The Court: Overruled.

(Thereupon photograph was received in evidence and marked as Defendants' Exhibit D-146.)

Mr. McClennen: I will show this to your Honor.

(Handing photograph to the Court.)

By Mr. McClennen:

Q. Now, will you describe to me the Colonia Theatre at this time, that is, January, 1942?

A. You say "at this time"? How do I know that is 1942, that picture you showed me? You just showed me a picture. It might have been taken 15 years ago.

Q. That is the kind of advertisement you might have issued any time along in the last 10 or 15 years?

[fol. 3728] A. I don't know when it is. You didn't give me any date.

Q. But you remember now that this 10-cent admission was advertised on banner form by you time and time again?

A. Oh, no, no.

Q. And throughout the years from time to time?

A. No, no.

Q. Well, what time? Can you remember when you put those 10 or 15-cent banner advertisements out?

A. Probably when we didn't have any pictures.

Q. Well, that was true of the whole period, was it not?

A. Pardon?

Q. That was true of the whole period, was it not?

A. Yes.

Q. That is, throughout the ten years from 1932 to 1942, you issued from time to time these banners, 10-20-cent admission advertisements, because you did not have any pictures, is that it?

A. That is not what I said. You said 1932. I said nothing about 1932. You told me this picture that you showed me was between 1936 and 1942, and I said I didn't know about it.

Q. Well, do you mean that on a number of occasions in that period you were advertising 10 and 20-cent admissions?

A. No, I don't know of any time I was advertising, but you showed me a picture where I was, and I would like to [fol. 3729] know where it was.

Q. You know very well, don't you?

A. I don't.

Q. And that you issued 10 and 20-cent banner advertisements?

A. I know what you showed me, a picture.

Q. You know you issued those, don't you?

A. I know I saw that picture.

Q. You know it was issued by you, don't you?

A. No, it was not issued by me.

Q. Whom was it issued by?

A. My manager, or anybody.

Q. Oh, your manager. You know that your manager issued such advertisements from time to time?

A. I would not say from time to time. It might have been a special occasion, or something else, like this morning matinee you showed me here.

Q. You notice that that banner does not say anything about a special occasion, don't you? You notice that?

A. It don't say anything about tax, either, does it?

Q. If it doesn't say anything about tax, would it enable you to say that you noticed that it did not say anything about special occasion on the banner?

A. Let me see the picture.

(Photograph handed to witness.)

[fol. 3730] A. What I mean to say here——

Q. All I asked you was, you noticed that it did not say anything about special occasion, did you not?

A. No, I don't see anything about special occasion, but I say, that price there could be a net price of 22 cents and a 3-cent tax is 25.

Q. Do you know whether you sent along with the banner when it was published, somebody to explain to those who saw the banner that they might have to pay some more besides this? Do you remember whether you did anything of that kind?

A. I don't know what you are driving at.

Q. Couldn't you answer the question without knowing what I am driving at?

A. In the old days, when the tax first came in, people advertised a net, their prices net, and they had to pay a tax on it. They didn't know until they got to the box office what the tax was going to be.

Q. What was the tax on a 20-cent admission in January, 1942, do you remember?

A. Tax on a 20-cent admission?

Q. Yes.

A. It would be 2 cents, I imagine, I don't know. 3 cents for 25-cent ticket, I think.

Q. That was the meaning of the "22" on the banner, was [fol. 3731] it not, including tax you would have to pay 22 cents?

A. No, 22 and 3 is 25.

Q. The banner does not say anything about that?

A. I know the banner doesn't say anything about it.

The Court: You have three different prices there. Were you advertising three prices?

The Witness: Well, the price would be children 10 cents and the other price——

The Court: That indicates 22 is the total with tax, that is the point.

The Witness: The other price would be matinee. Prices were different at matinee than at night.

The Court: You have three prices, 10, 20, 22.

The Witness: Yes, that would be three prices, 10 cents all day for children and probably in the afternoon it would be 20 plus 2, and at night 22 plus 3. It could be, but I don't know what this means. I don't remember. I don't make the banners.

Q. What it means, does it not, that your price of admission was 20 cents and there was 2 cents tax, so that the amount a person had to pay was 22 cents to get in?

A. What does the other side mean? You tell me what this side means. What does that side mean?

Q. If you look at the two sides and see they are exactly [fol. 3732] the same, you will be able to answer both questions at once.

A. That is what I say.

Q. That is, you know, Mr. Witness, as you sit there, don't you——

A. No, I don't know, or I would say so.

The Court: Just answer the question. Go ahead with your question. He answered before you completed your question.

Q. You know that what you intended to convey by that advertisement or your manager intended to convey was that the top price of admission was 20 cents plus a 2-cent tax, making it 22 cents, and that is the reason the 22 was put in bolder type. You know that, don't you?

A. No, I don't know that. You don't, either.

Q. I beg your pardon?

The Court: Strike out the last part, not responsive.

The Witness: I say you don't know that, either.

The Court: That is not necessary. Strike that out.

Q. At the time referred to, that is, January, 1942, will you describe the Colonia Theatre?

A. 1942?

Q. In January, 1942.

A. I don't believe I have been in the Colonia.

[fol. 3733] Q. What?

A. I have not been in the Colonia Theatre in 1942.

Q. When was the last time you were in the Colonia Theatre?

A. Golly, I couldn't tell you.

Q. Can you give me any idea at all?

A. No, I couldn't.

Q. Have you been in there at any time prior to May 19, 1942, and since 1938?

A. I might have been.

Q. Have you any recollection that you were not, or that you were?

A. No, I have not.

Q. The last time that you were in there, will you describe that theatre?

A. Describe it? About all I know about it, it is a theatre, and it has got a balcony, and it has got a long lobby, got some stores in front, some office building. It has a stage, has carpet and seats, just the same as any other theatre. Paint on the wall just the same as any other theatre.

Q. That is the best description you can give to the Court that desires to know the character of that theatre, is it?

A. What else do you want to know about it?

Q. Was it a first-class theatre?

[fol. 3734] A. Yes, I would say it was first-class.

Q. Right up, modern improvements in every way?

A. I should think so, yes.

Q. A desirable house in which to show first-run pictures?

A. Yes.

Q. The best house in town?

A. No, sir.

Q. It was the best house in town up to November, 1932, was it not?

A. That I couldn't tell, because I was not there then. I did not go in until 1930.

Q. What did you understand the date in my question to be?

A. I thought you said 1922.

Q. 1932, I said.

A. I beg your pardon.

Mr. McClennen: Now, if you will read the question and put an emphasis on the "'32" as you read it.

The Court: What he means is before your theatre was rebuilt, I suppose. The best theatre before your theatre was rebuilt?

The Witness: Well, I would say after I remodeled my theatre——

The Court: No, no.

The Witness: That is what he asked me.

[fol. 3735] Q. I said "before".

A. Is that what you asked me?

Q. What?

A. Is that what you asked me, 1930 to 1932?

Q. If the Colonia was the best house in town in that period?

A. Yes, I would say it was, yes, sir.

Q. Now, tell me the respects in which the Smalley Theatre built in 1932 is superior to the Colonia Theatre as it was in 1939?

A. I never said it was——

The Court: I don't think we ought to pursue that examination. He has described the Colonia Theatre as a first-class theatre. It seems to me you are going a good ways drawing conclusions from the facts that there are some differences in the construction of the buildings. Whether it was elaborate, that might bear on the questions involved here, but both are suitable for use as first-class and second-class pictures. The details of comparison of theatres, it seems to me is spending needless time.

Mr. McClennen: I suspend in deference to your Honor's suggestion on that subject. That is all.

The Court: Mr. Wright, we will have to go along.

[fol. 3736] Mr. Wright: I have this material. I will try to put it in as fast as I can.

Redirect examination.

By Mr. Wright:

Q. I will show you this telegram, dated May 27th, from you to Mr. Montague at Columbia, and ask you if that is the telegram you sent on or about that date?

A. That is it.

Mr. Wright: Mark this with the next plaintiff's exhibit number.

(Thereupon telegram dated May 27th, from Smalley to Montague, referred to, marked as Plaintiff's Exhibit No. 899 for identification.)

By Mr. Wright:

Q. I will show you this letter, December 4th, 1939, from you to Mr. Moross, and ask you if you wrote—if that is a copy of a letter you wrote on or about that date?

A. This is the attorney?

Q. Yes.

A. Yes, that is the answer to the other letter.

Mr. Wright: I will ask to have that marked with the next plaintiff's Exhibit number.

[fol. 3737] (Thereupon letter dated December 4, 1939, from Smalley to Mr. Moross, referred to, was marked as Plaintiff's Exhibit No. 900 for identification.)

Q. I will show you this telegram dated May 4th, 1939, from Abe Montague to O. L. Van Horne, and ask you if that was received on or about that date?

A. Yes, sir.

Mr. Wright: I will ask to have this marked with the next Plaintiff's Exhibit number.

(Thereupon telegram dated May 4th, 1939, from Montague to Van Horne, referred to, was marked as Plaintiff's Exhibit No. 901 for identification.)

Q. I will show you telegram from Van Horne to Montague, dated May 2nd, 1939, and ask you if you recognize that as the copy of the telegram that was sent to Mr. Montague on that date?

A. Yes, sir.

Mr. Wright: I will ask that this be marked with the next Plaintiff's Exhibit number.

(Thereupon telegram from Van Horne to Montague, dated May 2nd, 1939, referred to, was marked as Plaintiff's Exhibit No. 902 for identification.)

Mr. Wright: I will offer in evidence those exhibits 899 through 902.

[fol. 3738] Mr. McClennen: We object to each one of these, 899, 900, 901 and 902, and also ask that if received, they be not received as any evidence of the truth of the statements contained in them, and in order that your Honor may observe the significance of this in one of the many respects I call your Honor's attention to identification 902, to the

fact that it is from an attorney and not in the course of business and indicative of the self-serving statements made in the process of working up a case.

Mr. Wright: If the Court please——

The Court: What does that mean "per Federal Officials"?

Mr. Wright: Both Exhibits 143 and 144 offered by the defendants were letters received from counsel for Columbia. This completes the picture of this so-called attorney correspondence with Columbia.

The Court: What does that mean "per Federal Officials"?

Mr. Wright: I will ask the witness.

Mr. McClennen: These have not yet gone in evidence, I understand.

The Court: No.

By Mr. Wright:

[fol. 3739] Q. Do you know, Mr. Smalley, what the phrase in this Exhibit 902 for identification "per Federal Official's Advice" refers to?

Mr. McClennen: Just a moment. That I object to.

The Court: All right. I will receive them.

Mr. McClennen: I renew my motion, if your Honor please, that these be not received as any evidence of the truth of the statements contained in them.

The Court: Motion denied.

(Thereupon Plaintiff's Exhibits Nos. 899 to 902, inclusive, for identification, were received in evidence.)

By Mr. Wright:

Q. After you got this letter, June 3rd, 1940, marked as Defendants' Exhibit 143 in evidence, did you have any conversation with Mr. Weinberg or Mr. Miller about Columbia pictures for Norwich?

A. Well, Mr. Weinberg and Mr. Miller came up to Cooperstown and saw me.

Q. When was that?

A. I think it was in 1943, I think.

Q. I am talking about with reference to June 3rd, 1940, did they come to see you after or in 1940 after that?

A. Mr. Miller did, but Mr. Weinberg did not.

[fol. 3740] Q. When did you see Miller?

A. I should say it was—I would say about August.

Q. Where did you see him?

A. Cooperstown.

Mr. Rogers: Please raise your voice. We can't hear a word you are saying. What did he say?

(Question and answer read.)

Q. What was said then?

A. Mr. Miller told me Weinberg couldn't come up, that he would have to make an appointment later for him to come, and that he was riding Weinberg, and as soon as he heard from him, why, they would come up and see me.

Q. Then did they ever come up and see you in 1940?

A. 1940, no, I think it was the next year that they came up and saw me.

Q. 1941?

A. Yes.

Q. Do you know when it was in 1941 that they saw you?

A. I think it was in June or July, one or the other.

[fol. 3741] Q. Then it was in June or July, 1941?

A. No, it was earlier than that. I would say June. I think that is about when it was, in June.

Q. June, 1941?

A. Yes.

Q. Do you remember what was said then?

A. I took it up with Mr. Weinberg, that I had been corresponding with him and talking with Joe Miller and talking with Phil Fox in regard to clearance. The reason we couldn't get together with Columbia,——

Q. Just say what the conversation was.

A. I am telling you the conversation that I said to Mr. Weinberg, the reason we couldn't get together with Columbia was the clearance, that Columbia was demanding more than the other major companies over my other towns.

Q. This was with respect to Norwich?

A. No.

Q. I am asking you with respect to Norwich. Did you have a conversation with respect to Norwich?

A. Yes, this was in regard to Norwich. We couldn't get together in Norwich because he wouldn't sell me Norwich alone and he wouldn't sell me my other towns unless I paid the clearance which they had which was a lot more than the other major companies was giving Schine.

Q. Then there was no deal then made for Norwich?
[fol. 3742] A. No, there was no deal made.

Mr. Wright: That is all.

Recross-examination.

By Mr. McClennen:

Q. I show you, Mr. Smalley, a contract dated December 17, 1940, with Smalley Theatres, Inc., signed by H. L. Johnson, with the notation Joe Miller as the Columbia salesman, and approved December 20, 1940. Was that a contract which you made?

A. Are you referring to the conversation I just had?

Q. I am asking you if that is a contract which you made?

A. Oh, yes.

Q. And with what person did you negotiate that contract?

A. Joe Miller.

Q. And at what time?

A. The time it was signed there.

Q. Around about December, 1940?

A. Yes.

Mr. McClennen: I ask to have it marked.

Mr. Wright: We have no objection.

(The contract referred to, dated December 17, 1940, approved Dec. 20, 1940, with Columbia Pictures Corporation, was received in evidence and marked Defendants' Exhibit 147.)

The Court: A Columbia contract, was it?

[fol. 3743] Mr. McClennen: A Columbia contract, Defendants' Exhibit No. 147.

Q. This Exhibit, Mr. Smalley, recalls to your mind that you were in error just now in saying that you didn't see Mr. Miller in 1940?

A. I didn't mean Mr. Miller in regard to this. I meant in regard to a split or first-run contract in Norwich.

Q. Then you did see Mr. Miller after the time when he came up first and said that Mr. Weinberg could not come at that time? He did come again in 1940 and negotiated with you for a contract, did he not?

A. Yes, according to that.

Q. And your statement that you did not see Mr. Miller in 1940 was incorrect, was it not?

A. No. It might be incorrect if I said I hadn't seen him. I mean I hadn't seen him and Mr. Weinberg, which the letter you had there—that Mr. Weinberg and Mr. Miller was coming up and see me, and they didn't. That is what I meant, Mr. Miller and Mr. Weinberg did not come up together.

The Court: Is that all?

Mr. Wright: I think your Honor's attention should be called to the fact——

The Court: Is that marked?

Mr. Wright: Yes. First-run pictures rejected by Colonia [fol. 3744] Theatre.

Mr. McClennen:

Q. And during all this period you were getting second-run pictures from the various distributors, were you not?

A. Yes.

The Court: That is all. Is this other documentary evidence?

Mr. Wright: I think we can stipulate that.

Mr. McClennen: It is suggested we need not take your Honor's time. Mr. McGrath is here. I understand he has some papers and I suppose he will say that he has brought those papers from his Company's files.

Stephen W. McGrath resumed the stand in behalf of the Plaintiff, having been previously sworn, was examined and testified further as follows:

The Witness: That is correct.

Mr. Wright: I thought we could have the material marked and identified without the presence of the Court.

Mr. McClennen: That is what I thought.

The Court: Submit the papers to Mr. McClennen and then we will see.

Mr. McClennen: The witness has handed — a paper and that can just as well be marked for identification.

[fol. 3745] Mr. Wright: Yes, I was going to say if the Court wants to get away I don't see any reason for the Court's presence.

The Court: How many are there?

Mr. Wright: Just one.

(The paper, dated February 9, 1941, United Artists' clearances, was marked as Plaintiff's Exhibit 903 for identification.)

(Paper, subpoena, was marked as Plaintiff's Exhibit 904 for identification.)

Direct examination.

By Mr. Wright:

Q. Mr. McGrath, as I understand it, this document introduced here marked Plaintiff's Exhibit 903 for identification is the only document you have been able to locate in the United Artists' files containing the descriptions contained in the exhibit marked 904 for identification, is that right?

A. That is right.

Q. Have you exhausted the records of the Company in that respect?

A. I have exhausted the search.

[fols. 3746-3749] Mr. Wright: That is all.

The Court: We will adjourn until Friday morning at 10 o'clock.

(Whereupon a recess was taken until Friday, October 27, 1944, at 10 o'clock A.M.)

[fol. 3750] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223

UNITED STATES OF AMERICA

vs.

SCHINE CHAIN THEATRES, INC., et al., Defendants

Thursday, October 26th, 1944, 10 A. M.

In the absence of the Judge and by agreement of counsel there are marked for identification papers as follows:

Those so marked are for identification only.

Those marked without objection are introduced in evidence.

APPEARANCES:

Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Special Assistants to the Attorney General, and Philip Marcus, Esq., and Milton Kallis, Esq., Special Attorneys, in behalf of the United States.

Edward P. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homans, Esq., and Edward M. Antevil, Esq., appearing for the defendants.

[fol. 3751] OFFERS IN EVIDENCE

Mr. Marcus: The first matter on this morning is the introducing in evidence portions of Schines' answers to the Government's interrogatories. It is suggested that this be done by introducing the material in these answers by page reference with the understanding that the similar page in the original answer filed with the Clerk of this court will be considered to be in evidence.

The first two pages in Schines' answers to interrogatories being a prefatory statement are offered in evidence.

The following matter in Schines' answers to interrogatory No. 2 are offered in evidence. The information in column 1 in respect to Myer Schine, Louis Schine and John A. May, and the statement under the heading of "Name and Period of Employment of Marsh Gollner, District Manager, 10/1/38 to date."

There has been read in evidence the information in respect to Louis Lazar, transcript pages 500-501, and in respect to Lee Insley, transcript page 2954.

Mr. McClennen: Then we understand that nothing in [fol. 3752] answer to interrogatory No. 2 except what has been specifically stated is in evidence.

Mr. Marcus: That is right.

We offer in evidence the following portions of Schines' answers to interrogatory No. 3. The information stated in respect to J. Myer Schine, Louis W. Schine, John A. May, Willard S. McKay, and George V. Lynch. The information in respect to John A. May has been in part read in evidence at transcript pages 151-152.

It is understood that the above statement refers to the information in respect to the Schine Chain Theatres, Inc.

As to Schines' answers to interrogatory No. 3 in respect to Schines Circuit, Inc., the information stated in respect to

Louis W. Schine, John A. May, Willard S. McKay, is offered in evidence.

In respect to Schines' answers to interrogatory No. 3 as to the Schine Theatrical Co., Inc., the information stated in respect to J. Myer Schine, Louis W. Schine, John A. May, is offered in evidence.

In respect to Schines' answers to interrogatory No. 3, [fol. 3753] concerning the Schine Enterprises Corporation, the information stated as to J. Myer Schine, Louis W. Schine and John A. May is offered in evidence.

In respect to the answers in response to interrogatory No. 3, concerning Schine-Lexington Corporation, the information stated as to J. Myer Schine, John A. May, Willard S. McKay and Louis Lazar, Eugene Custer and Lou Hensler, is offered in evidence.

It is believed that information in respect to Louis Lazar has been read into the record at transcript pages 500-501.

In respect to Schines' answers to the Government's interrogatory No. 3, as to the Chesapeake Theatre Corporation, the information stated in respect to J. Myer Schine, Louis W. Schine, John A. May, Willard S. McKay and Marsh Gollner, is offered in evidence.

Mr. McClennen: It is understood that no other parts of the answer to interrogatory No. 3 are to be deemed in evidence.

Mr. Marcus: Schines' answer to interrogatory No. 4 is [fol. 3754] offered in evidence.

In respect to Schines' answers to interrogatory No. 7, the information stated as to Schine Chain Theatres, Inc., as to Class A common and Class B common, is offered in evidence.

The foot-note at the bottom of the page in respect to the St. Lawrence Holding Company is included in this offer.

We also offer in evidence Schines' answers to interrogatory No. 7 as to the ten largest stockholders of preference stock as of 8/31/40, Schinebro, Inc., 3,146 shares, J. Myer Schine, 1,384 shares, Louis W. Schine, 1,352 shares.

We also offer the statement made at the bottom of page 4 to Schines' answers to Interrogatory No. 7, to the effect that as to other Schine corporate defendants all stock held by the Schine Chain Theatres, Inc.

Mr. McClennen: We contend that by this offer there goes in evidence the other portions of the answer to interrogatory No. 7 as to the other stockholders and holdings in the class

[fol. 3755] from which the above portion has been sorted out.

Mr. Marcus: The Government does not agree with this contention. It is our purpose in offering the mass of material in these answers to put in just the matters that are necessary in order not to make the record larger than it would otherwise be. We suggest that as to any matters which the defendants would like to offer in evidence in respect to these answers be made upon application to the Court, or, perhaps, after conference with plaintiff's counsel upon stipulation.

Mr. McClennen: We do not accept the suggestion.

Mr. Marcus: We offer in evidence Schines' answer to interrogatory No. 16. In respect to Schines' answers to interrogatory No. 17, 17-A, 18 and 23, we offer in evidence the following portions:

The first page of Schines' answers to interrogatory No. 17, except for the statement made in respect to the Regent Theatre in Amsterdam, New York, under the heading "Remarks Re Closing Periods," "Open occasionally or part [fol. 3756] time, as business warrants."

Mr. McClennen: We make the same claim that this answer is in as a whole by this offer and that the deletion of a part of the particular answer is ineffective.

Mr. Marcus: The Government does not agree with this contention.

As part of this offer in evidence of the material on the first page of Schines' answers to interrogatory 17, 17-A, 18 and 23, the supplemental schedule to interrogatory No. 18 in respect to Amsterdam, New York, is offered in evidence.

[fol. 3757] Mr. McClennen: We contend that this makes the whole of the supplemental schedule a part of the evidence.

Mr. Marcus: We also offer in evidence Schine's answer to interrogatory No. 18, as contained in the supplemental schedule in respect to Auburn, N. Y.

Mr. McClennen: We make the same contention as in the case of the preceding portions of a supplemental schedule.

Mr. Marcus: We offer in evidence page 2 of Schine's answers to interrogatory No. 17-A, 18 and 23, except for the statement made under the heading of "Name of purchaser, if so, or remarks."

Mr. McClennen: We contend that this offer puts into evidence the whole of the answer referred to and that a portion of it may not be elided in this way and that the elision is ineffective.

Mr. Marcus: We offer in evidence Schine's answers to interrogatories 17-A, 18 and 23, as contained on page 3, except for the statements made under the heading: "Remarks re Closed Period," for Corning and Cortland thea-
[fol. 3758] tres, Cortland, N. Y.

Mr. McClennen: We contend that this offer puts in evidence the whole of that page with respect to the theatres referred to in the offer and that the elision of a part may not be made and that it is ineffective.

Mr. Marcus: We offer in evidence the answers made in respect to interrogatory No. 18, as contained in the supplemental schedule concerning Corning and Cortland, N. Y.

We offer in evidence page 4 of Schine's answers to interrogatory 17-A, 18 and 23, except for the statement made under the heading, "Remarks re Closed Period," for the Temple Theatre at Geneva, N. Y.

Mr. McClennen: We make the same contention, that a part of a single item of an answer in this way may not be elided, that the part so attempted to be elided is in evidence, and that the elision is ineffective.

Mr. Marcus: We offer in evidence page 5 of Schine's answers to interrogatory 17-A, 18 and 23, except for the statements made under the heading "Remarks re Closed Period" for the Richmond Theatre, Herkimer, the Temple
[fol. 3759] Theatre, Ilion and the Crescent Theatre, Newark.

Mr. McClennen: We make the same contention that by this offer the portions of the item attempted to be elided are in evidence and that the attempted elision is ineffective. An answer cannot be distorted by leaving a phrase of a part of it out.

Mr. Marcus: The Government at this time would like to make clear that, in part, it is not offering the statements except for the reason that it believes that they are self-serving declarations and conclusions.

The Government also offers in evidence Schine's answers to Interrogatory No. 18, contained in the supplemental schedule in respect to Herkimer, N. Y., save for the statement "Obsolete," and in respect to Newark, N. Y., and in respect to Little Falls, N. Y.

Mr. McClennen: We contend that by this offer the schedule as a whole is in evidence, that the attempted elision is ineffective and would distort the answer as to the particular items as to which the answer has been put in evidence.

[fol. 3760] Mr. Marcus: We offer in evidence page 6 of Schine's answers to interrogatories 17-A, 18 and 23, except for the statements made under the heading, "Remarks re Closed Periods", for the Hippodrome Theatre, Little Falls, and the Hi-Art Theatre, Lockport, N. Y.

Mr. McClennen: We contend that by this offer the entire answers as to these items are in evidence, that the attempted elision is ineffective and that the answer may not be distorted by removing a phrase from it, or attempting to do so.

Mr. Marcus: We offer in evidence page 7 of Schine's answers to interrogatories 17-A, 18 and 23, except for the statements made under the heading, "Remarks re Closed Periods", for the Pontiac Theatre, Ogdensburg, and the Strand Theatre, Onenta, and we also do not offer in evidence the statements made under the heading "Name of Opposition Theatre", for Norwich, because that matter has been testified to.

Mr. McClennen: We contend that by this offer the items from an item attempted to be elided are in evidence; that the attempted elision is ineffective and that an answer may [fol. 3761] not be distorted by omitting a phrase of the particular item of the answer.

Mr. Marcus: The Government also offers in evidence Schine's answer to interrogatory No. 18 as contained in the supplemental schedule in respect to Ogdensburg, N. Y., and Oswego, N. Y.

Mr. McClennen: We contend that by this offer the schedule is in evidence, that a portion may not be elided in this way and that to leave out a portion of an item distorts the answer.

Mr. Marcus: We offer in evidence page 8 of Schine's answers to interrogatories 17-A, 18 and 23. We are not offering in evidence Schine's answer to interrogatory No. 18 as contained in supplemental answer in respect to Rochester, N. Y.

Mr. McClennen: We contend that by this offer the parts just stated, attempted to be elided, are in evidence, that the attempted elision is ineffective, and that an answer

may not be distorted by leaving out a portion of a phrase in this way.

Mr. Marcus: The record should show that the statement omitted by the Government from its offer in respect to [fol. 3762] Rochester, refers to matters contained on page 9 of Schine's answers to interrogatory 17-A, 18 and 23.

We offer in evidence page 9 of Schine's answers to interrogatory 17-A; 18 and 23, except for the statement made under the heading "Remarks re Closed Period", for the Seneca Theatre, Seneca Falls.

Mr. McClennen: We contend that by this offer this entire page is in evidence; that the attempted elision is ineffective and that an item of an answer may not be distorted by leaving out a phrase thereof.

Mr. Marcus: We offer in evidence Schine's answers to interrogatory 17-A, 18 and 23, as contained on page 10.

We offer in evidence page 11 of Schine's answers to interrogatories 17-A, 18 and 23.

We are not offering the statement made in respect to Athens, Ohio, the Court Theatre, as contained in Schine's answers to interrogatory No. 18 in the supplemental schedule.

We are offering in evidence Schine's answers to inter- [fol. 3763] rogatory 17-A, 18 and 23, as contained on page 11, and as contained in the supplemental schedule of answers to interrogatories No. 18, except as otherwise stated.

Mr. McClennen: We contend that by this introduction in evidence the portions attempted to be elided are in evidence; that the attempted elision is ineffective, and that an answer may not be distorted by leaving out a phrase thereof.

Mr. Marcus: The Government asks that it be stated for the record that these answers to interrogatories 17-A, 18 and 23 are made in respect to specific theatres in specific towns and in respect to different interrogatories.

We offer in evidence page 12 of Schine's answers to interrogatories 17-A, 18 and 23, except for the statements made under the heading "Remarks re Closed Period" for the Court Theatre, Athens, the Strand Theatre, Bellefontaine, the Southern Theatre, Bucyrus, and for the State Theatre, Bucyrus, and also for the Star Theatre, Delaware, Ohio.

[fols. 3764-5] Mr. McClennen: We contend that by this offer the parts attempted to be elided are in evidence; that

the elision attempted is ineffective and that an answer may not be distorted by leaving out a phrase of it.

Mr. Marcus: We also offer in evidence Schine's answers to interrogatory 18 as contained in its answers to that supplemental schedule in respect to Bellefontaine, Ohio, Bucyrus, Ohio, and Delaware, Ohio.

Mr. McClennen: We contend that by this offer the parts attempted to be elided are in evidence; that the attempted elision is ineffective and that an answer may not be distorted by leaving out a phrase thereof.

Mr. Marcus: We offer in evidence page 13 of Schine's answers to interrogatories 17-A, 18 and 23, except for the statement under the heading "Closed Periods, if any", made in respect to the Opera House, Kent, Ohio, "Unable to obtain product."

Mr. McClennen: We contend that by this offer the part attempted to be elided is in evidence, that the attempted elision is ineffective, and that an answer may not be dis-
[fol. 3766] torted by leaving out a phrase of it.

Mr. Marcus: We offer in evidence page 14 of Schine's answers to interrogatories 17-A, 18 and 23.

We also offer in evidence Schine's answer to interrogatory 18 as contained in its supplemental schedule in respect to Norwalk, Ohio.

We offer in evidence page 15 of Schine's answers to interrogatories No. 17-A, 18 and 23, except for the statement made under the heading "Remarks re Closed Periods" for the Opera House at Wooster, Ohio.

Mr. McClennen: We contend that by this offer the entire page is in evidence; that the attempted elision is ineffective, and that an answer may not be distorted by leaving out a phrase of the particular part of it.

Mr. Marcus: The Government at this time asks Defendants' Counsel to supply the date of the dismantling of the theatre and the lapsing of the lease in respect to the Wallace Theatre, Wooster, as stated in Schine's answers to interrogatory 17-A, the date not being supplied.
[fol. 3767] Mr. McClennen: We have not the date here at hand.

Mr. Marcus: We also offer in evidence Schine's answer to interrogatory No. 18 as contained in the supplemental schedule in respect to Wooster, Ohio.

We offer in evidence page 16 of Schine's answers to interrogatories 17-A, 18 and 23.

We also offer in evidence Schine's answer to interrogatory No. 18 as contained in supplemental schedule in respect to Richmond, Kentucky.

We offer in evidence page 17 of Schine's answers to interrogatories 17-A, 18 and 23, except for the statement made under the heading "Remarks re Closed Periods", in respect to the State Theatre, Richmond, Kentucky.

Mr. McClennen: We contend that by this offer the part of the phrase of the answer attempted to be elided is in evidence; that the attempted elision is ineffective and that an answer may not be distorted by leaving out a phrase of the particular item.

Mr. Marcus: We offer in evidence page 18 of Schine's answers to interrogatories 17-A, 18 and 23, and we also [fo. 3768] offer in evidence Schine's answer to interrogatory No. 18 in respect to Cambridge, Maryland, for the purpose of the answers to these interrogatories, except the statement made at the end of Schine's answer to supplemental schedule No. 18.

We offer in evidence page 19 of Schine's answers to interrogatories 17-A, No. 18 and 23.

We offer in evidence Schine's answers to interrogatories 17-B and 17-C.

We offer in evidence Schine's answer to interrogatory No. 15, consisting of seven pages.

We offer in evidence page 1 of Schine's answer to interrogatory No. 19, page 2, page 3, page 4, page 5. On page 5 of Schine's answer to interrogatory No. 19 I am informed by Defendants' Counsel that the proper date under heading "Date Acquired" for the Southern Theatre, Bucyrus, should be April, 1937.

Page 6, except for the statement under the heading "From Whom Acquired", in respect to the Princess The-[fol. 3769] atre, Medina, the Government believes that the defendants are mistaken in this respect.

Mr. McClennen: We contend that by the introduction of this page 6 the portion attempted to be elided is in evidence and that the attempted elision is ineffective and that the answer may not be distorted by leaving out a portion thereof, and that the belief of plaintiff's Counsel should not become a part of the record.

We stipulate that with respect to this item of acquisition of 25 per cent interest, the actual acquisition was as is al-

ready having appeared in evidence in the trial of this case.

Mr. Marcus: We agree.

Page 7, page 8, page 9, page 10 and page 11.

We do not offer in evidence page 12 of Schine's answer to interrogatory No. 19.

Mr. McClennen: We contend that by this offer the portion which has been stipulated should be furnished and was furnished on this page is in evidence.

[fol. 3770] Mr. Marcus: We ask that the record show that the heading of Schine's answer to interrogatory No. 19 on page 12 is as to theatres built by the Schine defendants, the following information is furnished pursuant to stipulation, and that all the other information supplied in Schine's answers to interrogatory numbered 19 are under the heading with respect to each financial interest acquired by the defendant on or after August 31, 1931, with respect to theatres listed in answer to interrotatory No. 17, the following information is herewith furnished.

Mr. McClennen: The contents of the answers to interrogatories and the page in question appear in the text as filed in court.

Mr. Marcus: We offer in evidence Schine's answer to interrogatory No. 22.

We offer in evidence Schine's answers to interrogatory No. 31.

Mr. McClennen: We call to the attention of plaintiff's Counsel that in the answer to interrogatory No. 31 the next to the last item on the page, the date of the option to buy or [fol. 3771] lease is stated as January 10, 1938, and that this is a typographical eror and should read "January 10, 1939."

Mr. Marcus: Subject to anything in the record to the contrary, we accept the change.

We offer in evidence Schine's answers to interrogatory No. 32, consisting of two pages. We understand that interrogatory No. 32 consists merely of one page and we are offering that page.

We also offer the certification made by John A. May in respect to the answers to the interrogatory.

Mr. Wright: I will offer as Plaintiff's Exhibit 704-A the play-off sheet of the Universal Pictures in Lexington, Kentucky, for the 1938-1939 season.

(The play-off sheet, Universal Pictures, 1938-1939, was received in evidence and marked as Plaintiff's Exhibit 704-A.)

Mr. Wright: I will offer as Plaintiff's Exhibit 704-B the play-off sheet for the 1934-35 season at the Madison Theatre, Rochester.

[fol. 3772] (The play-off sheet for the 1934-35 season, Madison Theatre, Rochester, was received in evidence and marked Plaintiff's Exhibit 704-B.)

Mr. Wright: I will offer as Plaintiff's Exhibit 704-C the play-off sheet for the '35-'36 season.

(The play-off sheet for the 1935-36 season was received in evidence and marked Plaintiff's Exhibit 704-C.)

Mr. Wright: I will offer as Plaintiff's Exhibit 704-D the play-off sheet for the '36-'37 season.

(The play-off sheet for the '36-'37 season was received in evidence and marked as Plaintiff's Exhibit 704-D.)

Mr. Wright: Plaintiff's Exhibit 704-E is the same for the '37-'38 season.

(The play-off sheet for the 1937-38 season was received in evidence and marked as Plaintiff's Exhibit 704-E.)

Mr. Wright: Plaintiff's Exhibit 704-F is the Universal play-off at the Monroe Theatre, Rochester, for the 1934-35 season.

(The play-off sheet, Monroe Theatre, Rochester, 1934-35 season, was received in evidence and marked as Plaintiff's Exhibit 704-F.)

Mr. Wright: Plaintiff's Exhibit 704-G is the same for the 1935-36 season.

[fol. 3773] (The play-off sheet for the 1935-36 season was received in evidence and marked as Plaintiff's Exhibit 704-G.)

Mr. Wright: Plaintiff's Exhibit 704-H is the same for the 1936-37 season.

(The play-off sheet for the 1936-37 season was received in evidence and marked as Plaintiff's Exhibit 704-H.)

Mr. Wright: Plaintiff's Exhibit 704-I is the same thing for the 1937-38 season.

(The play-off sheet for the 1937-38 season was received in evidence and marked as Plaintiff's Exhibit 704-I.)

Mr. Wright: Plaintiff's Exhibit 704-J is the Universal play-off for the Riviera and Liberty Theatres at Rochester for the 1934-35 season.

(The play-off sheet, Riviera and Liberty Theatre, Rochester, for 1934-35 season was received in evidence and marked Plaintiff's Exhibit 704-J.)

Mr. Wright: Plaintiff's Exhibit 704-K is the same thing for the 1935-1936 season.

(The play-off sheet for 1935-36 season was received in evidence and marked as Plaintiff's Exhibit 704-K.)

[fol. 3774] Mr. Wright: Plaintiff's Exhibit 704-L is the same for the 1936-37 season.

(The play-off sheet for 1936-37 season referred to was received in evidence and marked Plaintiff's Exhibit 704-L.)

Mr. Wright: Plaintiff's Exhibit 704-M is the same for the 1937-38.

(The play-off sheet for 1937-38 was received in evidence and marked as Plaintiff's Exhibit 704-M.)

Mr. Wright: 704-N is the Universal play-off for the State and Dixie Theatres in Rochester for the 1934-35 season.

(The play-off sheet, Universal, for State and Dixie Theatres, Rochester, 1934-1935 season, received in evidence and marked as Plaintiff's Exhibit 704-N.)

Mr. Wright: Plaintiff's Exhibit 704-O is the same thing for the 1935-1936 season.

(The play-off sheet was received in evidence and marked as Plaintiff's Exhibit 704-O.)

Mr. Wright: Plaintiff's Exhibit 704-P is the same for the 1936-1937.

(The play-off sheet for 1936-1937 was received in evidence and marked as Plaintiff's Exhibit 704-P.)

[fol. 3775] Mr. Wright: Plaintiff's Exhibit 704-Q is the same for the 1937-1938.

(The play-off sheet for 1937-1938 was received in evidence and marked as Plaintiff's Exhibit No. 704-Q.)

Mr. Wright: I will offer as Plaintiff's Exhibit 704-R, the play-off of Universal Pictures in Van Wert, Ohio, for the 1934-1935 season.

(The play-off sheet, Universal, in Van Wert, Ohio, was received in evidence and marked as Plaintiff's Exhibit 704-R.)

Mr. Wright: Plaintiff's Exhibit 704-S is the same for the 1935-1936 season.

(The play-off sheet for 1935-1936 season was received in evidence and marked as Plaintiff's Exhibit 704-S.)

Mr. Wright: Plaintiff's Exhibit 704-T is the same for the 1936-1937 season.

(The play-off sheet for 1936-37 season was received in evidence and marked as Plaintiff's Exhibit 704-T.)

Mr. Wright: Plaintiff's Exhibit 704-U is the same for the 1937-1938 season.

[fol. 3776] (The play-off sheet for 1937-1938 season was received in evidence and marked as Plaintiff's Exhibit 704-U.)

Mr. Wright: Plaintiff's Exhibit 704-V is the same for the 1938-1939 season.

(The play-off sheet for 1938-1939 season was received in evidence and marked as Plaintiff's Exhibit 704-V.)

Mr. Wright: Plaintiff's Exhibit 704-W is the same for the 1939-1940 season.

(The play-off sheet for 1939-1940 season was received in evidence and marked as Plaintiff's Exhibit 704-W.)

(Whereupon, a recess was taken until 2 o'clock P. M.)

[fol. 3777] After recess, 2 o'clock P. M.

Appearances: As before noted.

Mr. Wright: Plaintiff's Exhibit 718-A is a page taken from Exhibit 718, which shows the play-off of United Artists features, first-run, at Auburn, New York, for the seasons 1934-35 and 1935-36.

Plaintiff's Exhibit 718-B is the page from Exhibit 718, which shows the play-off of United Artists features in Lock-

port, New York, first-run, for the season 1931-32, 1932-33 and 1933-34.

718-C, is the page which shows the play-off in the same town for the seasons 1934-35, and 1935-36, first-run.

718-D, is the page from 718, which shows the play-off at Bucyrus, Ohio, first-run for 1934-35 and 1935-36 seasons.

718-E, is the sheet which shows the first-run play-off at Mount Vernon, Ohio, for the 1934-35 and 1935-36 seasons.

718-F is the sheet which shows the first-run play-off at Norwalk, Ohio, for the 1934-35 and 1935-36 seasons.

[fol. 3778] Mr. McClennen: It is understood that the letters "P.N.P." indicate "Paid not played."

Mr. Wright: 718-G is the page showing the first-run play-off at Van Wert, Ohio, for the 1934-35 and 1935-36 seasons.

718-H is the page showing the first-run play-off at Little Falls, New York, for the 1934-35 and 1935-36 seasons.

718-I is the sheet which shows the first-run play-off at Norwich, New York, for the 1934-35 and 1935-36 seasons.

(Thereupon the sheets referred to were marked as Plaintiff's Exhibits Nos. 718-A, 718-B, 718-C, 718-D, 718-E, 718-F, 718-G, 718-I in evidence.)

Mr. Wright: Will you mark this?

(Thereupon United Artists Corporation answers to interrogatories Nos. 15 and 16, previously marked for identification, were received in evidence and marked as Plaintiff's Exhibit No. 719.)

Mr. Wright: This folder designated Malone, New York, Paramount, Boumansour, will be marked Plaintiff's Exhibit 905, and it contains all of the documents produced by [fol. 3779] Paramount Pictures, Inc., and Paramount Film Distributing Corporation in response to the subpoena served upon it returnable October 21st, 1944, calling for the production of "All license agreements between your company and Michael Boumansour for the exhibition of feature motion pictures at the Plaza Theatre, Malone, New York, for the motion picture seasons 1936-37 through 1941-42," such document being Plaintiff's Exhibit 905-A, a contract dated September 19, 1938, for group S-10, second-run.

905-B, contract of the same date for second-run of "Men With Wings."

905-C, a contract of April 3, 1940 for second-run of group S-11.

905-D, a contract dated April 3, 1940, for second-run of S-12.

905-E, a contract dated April 3, 1940, for six "Hop Along Cassidy," second-run.

Plaintiff's Exhibit 906 is a folder containing all of the documents produced by Loew's Incorporated in response to a subpoena returnable October 23, 1944, calling for "All license agreements between your company and Michael [fol. 3780] Boumansour for the exhibition of feature motion pictures at the Plaza Theatre, Malone, New York, for the motion picture seasons 1936-37 through 1941-42," which documents are 906-A, a contract for five features, first-run, the application date January 27, 1937.

906-B, a contract with application date September 24, 1937 for second-run of 1936-37 feature productions.

906-C, a contract with application date May 4, 1938 for second-run of 1938-39 productions.

906-D, a contract, application date July 27th, 1938 for seven feautres entitled, respectively, "Wilderness," "Born to Dance," "The Devil is Sissy," "Family Affair," "Old Hutch," "Tarzan Escapes," "Tale of Two Cities."

906-E, a contract, application date August 4, 1938 for second-run of 1937-38 for fifteen 1937-38 productions.

906-F, will be contract with application date October 26, 1939, for second-run of 1939-40 features.

[fol. 3781] 906-G is contract, application date November 7, 1940, for second-run of 1940-41 features.

906-H is contract, application date January 14th, 1941, for "Babes in Arms," repeat-run.

907 is a folder containing all of the documents produced by R.K.O. Radio Pictures, Inc., in response to a subpoena returnable October 23, 1944, calling for "All license agreements between your company and Michael Boumansour for the exhibition of feature motion pictures at the Plaza Theatre, Malone, New York, for the motion picture seasons 1936-37 through 1941-42," which documents are 907-A, a contract, application dated January 31, 1938, for "Music for Madame," "Living on Love," "Everybody's Doing it," "There Goes the Groom," "Quick Money," "Make a Wish," second-run.

907-B is contract, application date January 31, 1938, for fourteen 1936-37 features, second-run.

907-C is dated October 31, 1938, for 48 1938-39 features, [fol. 3782] second-run.

907-D is dated May 6th, 1940, for second-run of 20 1939-40 features.

907-E is contract dated October 31, 1940, for "Pinocchio," second-run.

908 is a folder containing all of the documents produced by Warner Brothers Pictures, Inc., in response to a subpoena returnable October 23rd, 1944, calling for "All license agreements between your company and Michael Boumansour for the exhibition of feature motion pictures at the Plaza Theatre, Malone, New York, for the motion picture seasons 1936-37 through 1941-42."

This is also produced in response to the subpoena. If you want to give testimony to the other thing we will put your testimony in the record.

Mr. McClennen: This is not the time for putting testimony in.

Mr. Wright: I submit on this particular question we can come to an agreement as to what happened. We do want the testimony in as to just what happened. All we are [fol. 3783] covering here is what you produced in court in response to the subpoena.

Mr. McClennen: If you persist in indicating that this folder is all that Warner produced in response to the subpoena, we protest that that statement should not go on the record, because of the fact that we are advised that Warner in pursuance of the subpoena sent to Buffalo certain contracts and that one of those contracts was asked for for the purpose of cross-examination of Mr. Boumansour by defendants' counsel and was handed by Warner's representative to defendants' counsel at that time, used in the cross-examination and subsequently put in evidence by plaintiff's counsel as plaintiff's Exhibit 863.

Mr. Wright: This folder, Exhibit 908 contains all of the documents produced in response to the subpoena of ——, ——, calling for "All license agreements between your company and Michael Boumansour for the exhibition of feature motion pictures at the Plaza Theatre, Malone, New York, for [fol. 3784] the motion picture seasons 1936-37 through 1941-42," except Plaintiff's Exhibit 863 and the contract marked as Defendants' Exhibit 155 for identification which

were delivered to counsel for the defendants prior to the receipt by plaintiff's counsel of any advice to the effect that those contracts were in Buffalo.

Mr. McClennen: At the request of defendants' counsel in court where the papers were in the course of the cross-examination of the Witness Boumansour for the purpose of their being available for that cross-examination.

Mr. Wright: Such documents are, 908-A, contract dated, —and these are all the application dates,—January 23rd, 1940 for second-run of 1939-40 features with letter of June 26th, 1940 from G. L. Sears to Michael Boumansour and three notifications of elimination attached.

908-B is dated January 23, 1939, "The Great Garrick," "Wine, Women and Horses," "Expensive Husbands," "They Won't Forget," "Missing Witnesses," "Patient In Room 18," "Mystery House," "Fools For Scandal," first-run.

[fol. 3785] 908-C is dated March 20, 1939, contract for second-run of the 1938-39 features with a notification of cancellation of 13 features attached and notation that cancellations offset by 12 other releases.

908-D is dated January 23rd, 1940, for second-run of six John Wayne Westerns.

908-E is dated 12/28/36 for "Lucky Legs," "Jail Break," "Broadway Hostess," "Man of Iron," "Widow from Monte Carlo," "Murder of Dr. Harrigan," "Personal Maid's Secrets," "Two Against the World," first-run.

We will offer this Defendants' Exhibit D-155 in evidence as Plaintiff's Exhibit 909.

It is stipulated that in response to subpoena served upon 20th Century-Fox Film Corporation, returnable October 23, 1944, calling for "All license agreements between your company and Michael Boumansour for the exhibition of feature motion pictures at the Plaza Theatre, Malone, New York, for the motion picture seasons 1936-1937 through [fol. 3786] 1941-42," that no documents were produced.

Mr. McClennen: The Fox representative states that none have been found or produced.

Mr. Marcus: The Government is now offering in evidence leases as hereafter specified, produced by the defendants, pursuant to a notice to produce, dated October 11, 1944.

Mr. McClennen: It is stipulated that the defendants may withdraw the original and substitute photostats.

Mr. Marcus: I ask to have these five documents marked in evidence.

(Thereupon five leases referred to were marked as Plaintiff's Exhibits Nos. 910, 911, 912, 913 and 914 in evidence.)

Mr. Marcus: Plaintiff's Exhibit 910 in evidence is a lease between Stanhope Boal, lessor and the Sidney Theatre Corporation as lessee for the Bijou Theatre in Piqua, Ohio, for three years and two months, from the first day of May, 1931, to the 30th day of June, 1934. The lease is dated May 16, 1931.

[fol. 3787] Plaintiff's Exhibit 911 in evidence is a lease covering the Bijou Theatre in Piqua, Ohio, between the Piqua National Bank & Trust Company of Piqua, Ohio, Trustee under the Will of Stanhope Boal, deceased, by August S. Clause, Assistant Trust Officer thereof, as lessor, and the Belpak Theatre Corporation of Ohio, as lessee for the term of two years from the first day of March, 1934 to the 28th day of February, 1936. The lease is dated February 23, 1934.

Plaintiff's Exhibit 912 in evidence is a lease between the Piqua National Bank & Trust Company of Piqua, Ohio, Trustee, under the Will of Stanhope Boal, deceased, by George M. Peffer, Trust Officer thereof, as lessor and the Belpak Theatre Corporation of Ohio, as lessee, for the Bijou Theatre in Piqua, Ohio, for a term of two years from the first day of March, 1936 to the 28th day of February, 1938. The lease is dated the 15th day of February, 1936.

Plaintiff's Exhibit 913 in evidence is a lease between the [fol. 3788] Piqua National Bank & Trust Company of Piqua, Ohio, Trustee, under the Will of Stanhope Boal, deceased, by George M. Peffer, Trust Officer thereof, as lessor, and the Belpak Theatre Corporation of Ohio, as lessee, for the Bijou Theatre in Piqua, Ohio, for a term of two years from the first day of March, 1938, to the 28th day of February, 1940. The lease is dated November 27th, 1937.

Plaintiff's Exhibit 914 in evidence is a lease between *between* the Piqua National Bank & Trust Company of Piqua, Ohio, Trustee, under the Will of Stanhope Boal, deceased, as lessor, and the Belpak Theatre Corporation of Ohio, as lessee of the Bijou Theatre in Piqua, Ohio, for a term of five years from the first day of March, 1940, to the 28th day of February, 1945. The lease is executed as of the 10th day of January, 1940.

(Thereupon two leases were marked as Plaintiff's Exhibits 915 and 916 in evidence.)

Mr. Marcus: Plaintiff's Exhibit 915 in evidence is a lease and option to purchase between Robert A. Landry, individ-
[fol. 3789] ually, and Robert A. Landry and Mildred C. Madlin, as Executors of the Estate of Ruby F. Castle, deceased, to Schine Chain Theatres, Inc., of the Star Theatre, Ogdensburg, New York, commencing September 6, 1941, and expiring September 6, 1946, at noon. The lease was executed as of the 25th day of October, 1941.

Plaintiff's Exhibit No. 916 is a lease and option to purchase by the Ogdensburg Strand Theatre Co., Inc., to Schine Chain Theatres, Inc., of the Star Theatre, Ogdensburg, New York, dated September 6, 1936, expiring September 5, 1941. The Star Theatre referred to in Plaintiff's Exhibit 916 is also known as the Pontiac. The lease was executed August 20, 1936.

(Thereupon a lease was marked as Plaintiff's Exhibit 917 in evidence.)

Mr. Marcus: Plaintiff's Exhibit 917 in evidence is a lease between the Ogdensburg Strand Theatre Company, Inc., and Schine Chain Theatres, Inc., of the Star Theatre in Ogdensburg, New York, dated September 6, 1926 for a term
[fol. 3790] commencing the 6th day of September, 1926, to the 6th day of September, 1936.

Mr. McClennen: The lease of the Strand Theatre simultaneous with that of the Star, Exhibit 917, not being called for by the notice to produce is not here in court, and I understand that the plaintiff does not desire it.

Mr. Marcus: That is right.

(Thereupon a lease and agreement were marked as Plaintiff's Exhibits Nos. 918 and 919, respectively, in evidence.)

Mr. Marcus: Plaintiff's Exhibit 918 in evidence is a lease made the 31st day of October, 1934, between Henry Pohl and Rebecca Pohl, lessors, and J. Steel, of Oberlin, Ohio, and William K. Selman, of Cleveland, Ohio, as lessees, of premises located in the City of Norwalk, as described in said lease on which premises subsequently the Forum Theatre was built. The lease is for a term of 10 years beginning on the 1st day of January, 1935 and ending on the 31st day of December, 1944. The lease is executed as of the 31st day of October, 1934.

[fol. 3791] Plaintiff's Exhibit 919 in evidence is an agreement as of the 5th day of January, 1942, between Henry Pohl and Rebecca Pohl, called the lessors, and the Norwalk Theatre Corporation, called the lessee, reciting the assignment of a lease bearing date the 31st day of October, 1934, marked in evidence as Plaintiff's Exhibit 918, stating that the aforesaid lease marked as Plaintiff's Exhibit 918 is cancelled.

(Thereupon a lease and two agreements were marked as Plaintiff's Exhibits Nos. 920, 921 and 922, respectively.)

Mr. Marcus: Plaintiff's Exhibit No. 920 in evidence is a lease beween G. W. Croucher, as lessor and Newark Theatres, Inc., dated the 15th day of April, 1926, of the building known as the Crescent Theatre Building, located in Newark, New York.

Mr. McClennen: Referring to Newark, you have heretofore had marked for identification Exhibit 83, leasing the Crescent Theatre at Newark.

Mr. Marcus: I offer Plaintiff's Exhibit 83 for identification in evidence.

[fol. 3792] (Thereupon the lease referred to, previously marked as Plaintiff's Exhibit 83 for identification, was received in evidence.)

Mr. Marcus: Continuing in respect to Plaintiff's Exhibit 920 in evidence, the lease is for a term of five years, from the 15th day of April, 1926, to midnight, April 14, 1931.

Plaintiff's Exhibit 921 in evidence is an agreement made the 15th day of May, 1934, between Rose E. Croucher, as lessor, and Dominion Operating Co., Ltd., as lessee, leasing the Newark Theatre Building, Newark, for a term of 2 years, from the first day of October, 1934, to the 30th day of September, 1936.

Plaintiff's Exhibit 922 in evidence is an agreement between Rose E. Croucher and Dominion Operating Co., Ltd., extending the lease dated May 15, 1934, for a term of five years from the first day of October, 1936, to the 30th day of September, 1941. The agreement is dated May 14th, 1936, and is executed by Rose E. Croucher as of the 19th day of May, 1936, and by J. A. May, as Comptroller of the [fol. 3793] Dominion Operating Co., Ltd., May 28th, 1936.

Plaintiff's Exhibit 83 in evidence is an agreement made August 23, 1940, between William G. Croucher and Altus P. Croucher, as lessors, and the Dominion Operating Co., Ltd., leasing the building known as the Newark Theatre Building, for a term of five years, from the 1st day of October, 1941, to the 30th day of September, 1946. It is understood that these leases refer to the Crescent Theatre in Newark.

(Thereupon two leases, an option and an agreement, were marked as Plaintiff's Exhibits Nos. 923, 924, 925 and 926, respectively, in evidence.)

Mr. Marcus: Plaintiff's Exhibit 923 in evidence is a lease made the 8th day of January, 1926, between J. J. Lanigan, as lessor, and Hi-Art Theatre Corporation, as lessee, leasing the Hi-Art Theatre in the City of Lockport, New York, for a term of 10 years, commencing on the 10th day of January, 1926, and ending on the 9th day of January, 1936.

Plaintiff's Exhibit 924 in evidence is a lease made the [fol. 3794] 25th day of May, 1933, between J. J. Lanigan, as lessor, and Schine Theatrical Co., Inc., as lessee, leasing the Hi-Art Theatre, Lockport, New York, for a term of two years and 10 months, commencing on the 10th day of March, 1933, and ending on the 9th day of January, 1936.

Plaintiff's Exhibit 925 in evidence is an option of renewal made on the 5th day of October, 1933, between J. J. Lanigan and Schine Theatrical Co., Inc. The option of renewal relates to a lease made the 25th day of May, 1933, between said parties for a term of two years and ten months, commencing on the 10th day of March, 1933, and ending on the 9th day of January, 1936.

Plaintiff's Exhibit 926 in evidence is an agreement made the 31st day of December, 1937, between J. J. Lanigan, as lessor, and the Schine Theatrical Co., Inc., as lessee, leasing the Hi-Art Theatre in Lockport, New York, for a further term of ten years from the 9th day of January, 1941, to the 9th day of January 1951.

[fol. 3795] (Thereupon a lease and an agreement were marked as Plaintiff's Exhibits Nos. 927 and 928 in evidence.)

Mr. Marcus: Plaintiff's Exhibit No. 927 in evidence is a lease between Odd Fellows Temple Association, as lessor,

and the Schine Theatrical Co., Inc., of the Auditorium Room and stage on the main floor of the Odd Fellows Temple Building, for five years, beginning on the first day of July, 1936, and ending on the 30th day of June, 1941. The lease was executed on the 29th day of June, 1936.

Plaintiff's Exhibit 928 in evidence is an agreement made on the 8th day of April, 1942, between the United Odd Fellows Association of Ilion, and the Schine-Ilion Corporation, leasing a part or portion of the building known as the Temple Building, or Odd Fellows Building, in Ilion, for the term of five years, to commence on May 5, 1942, and to end on May 4, 1947.

Mr. McClennen: Plaintiff's Exhibit 85 for identification, dated May 24, 1937, relates to this same subject matter and has been referred to in the examination or cross-examina-
[fol. 3796] tion of Mr. Pierce, the witness.

(Thereupon two leases were marked as Plaintiff's Exhibits Nos. 929 and 930 in evidence.)

Mr. Marcus: It is understood that Plaintiff's Exhibit 928 is a lease of the premises referred to as Temple Theatre in Schines' answers to interrogatory 17-A.

Plaintiff's Exhibit No. 929 in evidence is a lease made the 25th day of June, 1935, between Charles L. Mickey and Claud W. Mickey, as lessors, and Carl M. Kahn, of the first floor and basement of the business room located at No. 115 North Main Street, Fostoria, Ohio, for five years, commencing on the first day of July, 1935, and ending on the 30th day of June, 1940.

Plaintiff's Exhibit 930 in evidence is a lease made the 11th day of June, 1940, between Charles L. Mickey and Claud W. Mickey, as lessors, and the Fostoria Theatre Corporation, of the first floor and basement of the business room located at No. 115 North Main Street, Fostoria, for five years, beginning the first day of July, 1940, and ending
[fol. 3797] the 30th day of June, 1945.

It is understood that Plaintiff's Exhibits in evidence Nos. 929 and 930 relate to the premises known as the Roxy Theatre, Fostoria.

(Thereupon two leases were marked as Plaintiff's Exhibits Nos. 931 and 932 in evidence.)

Mr. Marcus: Plaintiff's Exhibit 931 in evidence is a lease made the first day of April, 1936, between the National City

Bank of Cleveland, Trustee of Phoebe S. Carroll, as lessor, and the Crawford Theatre Company as lessee, leasing the Southern Theatre for five years beginning the first day of April, 1936, and ending the 31st day of March, 1941.

Plaintiff's Exhibit No. 932 in evidence is a lease made the first day of April, 1941, between the National City Bank of Cleveland, Trustee of the Phoebe S. Carroll, et al., Trust, as lessor, and the Crawford Theatre Company, as lessee, leasing the Southern Theatre in Bucyrus, Ohio, for two years, beginning on the first day of April, 1941, and ending [fol. 3798] on the 31st day March, 1943.

(Thereupon six leases were marked as Plaintiff's Exhibits Nos. 933, 934, 935, 936, 937 and 938 in evidence.)

Mr. Mareus: Plaintiff's Exhibit No. 933 in evidence is a lease made the first day of August, 1933, between the Opera Block Company, as lessor, and the Schine Theatrical Company, Inc., leasing the Opera House in Bellefontaine, Ohio, for one year beginning September 1, 1933, and ending August 31, 1934.

Plaintiff's Exhibit No. 934 in evidence is a lease made the 3rd day of August, 1937, between the Opera Block Company and the Schine Theatrical Company, Inc., of the Opera House, Bellefontaine, Ohio, for the term of one year beginning on the 1st day of September, and ending on the 31st day of August, 1938.

Plaintiff's Exhibit No. 935 in evidence is a lease made the 31st day of August, 1938, between the Opera Block Company, as lessor, and the Schine Theatrical Company, Inc., as lessee, of the Opera House in Bellefontaine, Ohio, for the [fol. 3799] term of one year, beginning on the first day of September, 1938, and ending on the 31st day of August, 1939.

Plaintiff's Exhibit 936 in evidence is a lease made the 31st day of August, 1939, between the Opera Block Company, of Bellefontaine, as lessor, and the Schine Theatrical Company, Inc., as lessee, leasing the Opera House in Bellefontaine, Ohio, for the term of one year beginning on the 1st day of September, 1939, and ending on the 31st day of August, 1940.

Plaintiff's Exhibit No. 937 in evidence is a lease made the 14th day of August, 1940, between the Opera Block Company, as lessor, and the Schine Theatrical Company, as lessee, leasing the Opera House in Bellefontaine, Ohio,

for the term of one year, beginning on the first day of September, 1940, and ending on the 31st day of August, 1941.

Plaintiff's Exhibit 938 in evidence is a lease made the 18th day of August, 1941, between the Opera Block Company, as lessor, and the Schine Theatrical Company, Inc., [fol. 3800] as lessee, of the Opera House, Bellefontaine, Ohio, for the term of one year beginning on the first day of September, 1941, and ending on the 31st day of August, 1942.

(Thereupon three leases were marked as Plaintiff's Exhibits 939, 940 and 941 in evidence.)

Mr. Marcus: Plaintiff's Exhibit 939 in evidence is a lease between Daniel Gutilla, lessor, and the Schine Enterprises, Inc., as lessee, of the Strand Theatre in Bellefontaine, Ohio, for a term beginning the first day of July, 1931, and ending on the first day of June, 1934, and an agreement to assign to the lessee the present lease of the Opera Block Theatre. The date of the lease is the 28th day of July, 1931.

Plaintiff's Exhibit No. 940 in evidence is a lease between Daniel Gutilla, as lessor, and the Schine Theatrical Co., Inc., as lessee, of the Strand Theatre for a term beginning the first day of June, 1934, and ending on the first day of June, 1936. The lease is dated the 29th day of March, [fol. 3801] 1934.

Plaintiff's Exhibit No. 941 in evidence is a lease dated the 22nd day of May, 1936, between Daniel Gutilla, as lessor, and the Schine Theatrical Co., as lessee, of the Strand Theatre, in Bellefontaine, Ohio, for a term beginning the first day of June, 1936, and ending on the first day of June, 1938.

Mr. McClennen: Plaintiff's Exhibit 646 is in evidence at page 1602, a lease of April 30th, 1938, Gutilla to Schine.

647 is in evidence at page 1618, a lease July 1, 1940.

(Thereupon four leases were marked as Plaintiff's Exhibits 942, 943, 944 and 945 in evidence.)

Mr. Marcus: Plaintiff's Exhibit 942 in evidence is a lease between Daniel M. Osborne, as lessor, and Maurice A. Shea, as lessee, of the New Jefferson Theatre, Auburn, New York, beginning the 15th day of October, 1918, and ending October 15, 1928. The lease is dated the 9th day of March, 1918.

Plaintiff's Exhibit 943 in evidence is a lease made the 5th [fol. 3802] day of August, 1929, between Charles D. Osborne and Lithgow Osborne, as Executors and Trustees under the Last Will and Testament of Thomas M. Osborne, as lessors, and Maurice A. Shea, as lessee, of the New Jefferson Theatre in the City of Auburn, New York, for a term beginning the 15th day of October, 1929, for five years, ending October 14th, 1934.

Plaintiff's Exhibit 944 in evidence is a lease made between Maurice A. Shea, as lessee, and the Up State Amusement Co., as sub-lessee, of the New Jefferson Theatre, Auburn, New York, for five years, commencing October 15th, 1936, and terminating on the 14th day of October, 1941, executed on the 5th day of May, 1937.

Plaintiff's Exhibit No. 945 in evidence, is a lease made the 9th day of July, 1938, between Charles D. Osborne, and Lithgow Osborne, as executors and trustees under the Last Will and Testament of Thomas M. Osborne, as lessors, and the Up State Amusement Company, Inc., as lessee, of the New Jefferson Theatre, Auburn, New York, for a term [fol. 3803] beginning the 16th day of May, 1938, and ending May 15th, 1948.

Mr. McClennen: Referring back to Plaintiff's Exhibit 927, it is stipulated that pursuant to the option therein the lease was renewed for five years, ending June 30th, 1946.

(Thereupon an assignment was marked as Plaintiff's Exhibit No. 946 in evidence.)

Mr. Marcus: Plaintiff's Exhibit No. 946 relates to Plaintiff's Exhibits 923, 924, 925 and 926 in evidence. Plaintiff's Exhibit No. 946 in evidence is an assignment by the Hi-Art Theatre Corporation to the Lockport Enterprises, Inc., of its interest in a lease dated the 8th day of January, 1926, between J. J. Lanigan, as lessor, and the Hi-Art Theatre Corporation, as lessee. The assignment is made as of the first day of October, 1927.

(Thereupon a lease was marked as Plaintiff's Exhibit No. 947 in evidence.)

Mr. Marcus: Plaintiff's Exhibit No. 947 in evidence is a lease made the 20th day of May, 1936, between John Palfi [fol. 3804] and Susie Palfi, as lessors, with the Sidney Theatre Corporation as lessee, for premises described therein in Kent, Ohio, for a term of five years, commencing

the first day of June, 1936, and ending the 30th day of May, 1941, dated the 20th day of May, 1936. The premises referred to in Plaintiff's Exhibit No. 947, is the Opera House, Kent, Ohio.

Mr. McClennen: It is stipulated that this lease was renewed pursuant to the option until May 31, 1946.

(Thereupon an agreement previously marked for identification as Plaintiff's Exhibit No. 85, was received in evidence.)

Mr. Marcus: Plaintiff's Exhibit No. 85 in evidence relates to Plaintiff's No. 928 in evidence. Plaintiff's Exhibit No. 85 in evidence is an agreement made the 24th day of May, 1937, between Young & Whitney, Inc., called the seller and the Perry Theatre Corporation, called the purchaser. The agreement relates to the property known as the Capitol Theatre in Ilion, and the Opera House in Ilion. The seller [fol. 3805] agrees to assign to the purchaser the lease dated May 5, 1937, made between United Odd Fellows Association and the seller, covering the premises known as the Temple Theatre.

Mr. Wright: This is Plaintiff's Exhibit No. 685. It has already been identified as the Columbia play-off records for these towns.

685-A will be the play-off record for the Southern Theatre at Bucyrus, Ohio, for the 1934-35 season.

Plaintiff's Exhibit 685-B is the Bucyrus and State Theatres, at Bucyrus, Ohio, 1935-36 season.

685-C is the play-off for the Southern Theatre at Bucyrus, Ohio, for the 1935-36 season.

Exhibit 685-D is the Moose Theatre, at Norwalk, Ohio, 1935-36.

685-E is the Forum and Moose Theatres, Norwalk, Ohio, 1936-37 season.

685-F is the Smalley Theatre at Norwich, New York, 1933-34 season.

685-G is the Colonia Theatre at Norwich, New York, 1934-35.

[fol. 3806] 685-H is the Smalley Theatre at Norwich, 1934-35 season.

685-I is the Colonia Theatre, Norwich, 1935-36 season.

685-J is the Smalley Theatre, Norwich, 1935-36 season.

685-K is the Smalley Theatre, Norwich, 1936-37 season.

685-L is the Colonia Theatre, Norwich, 1936-37 season.

685-M is the Madison Theatre, Rochester, New York, 1937-38 season.

685-N is the Monroe Theatre, Rochester, 1937-38 season.

685-O is the Dixie Theatre, Rochester, 1937-38 season.

685-P is the Riviera Theatre, Rochester, 1937-38 season.

685-Q is the Liberty Theatre, Rochester, 1937-38 season.

685-R is the State or Dixie, Rochester, 1938-39 season.

685-S is also the State or Dixie, Rochester, 1938-39 season.

685-T is the Monroe Theatre, Rochester, 1938-39.

[fols. 3807-3810] 685-U is the Madison Theatre, Rochester, 1938-39 season.

685-V is the Liberty or Riviera, Rochester, for 1938-39 season.

685-W is the Liberty, Rochester, 1938-39 season.

685-X is Ohio Theatre, Van Wert, Ohio, 1935-36 season.

685-Y is Strand and Van Wert Theatres, Van Wert, Ohio, 1936-37 season.

(Whereupon a recess was taken until Friday, October 27th, 1944, at 10 o'clock.)

[fol. 3811] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223.

UNITED STATES OF AMERICA

vs.

SCHINE CHAIN THEATRES, INC., et al., Defendants

Continuation of trial October 27th, 1944, at 10 o'clock.

APPEARANCES:

Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Philip Marcus, Esq., Special Assistants to the Attorney General and Milton Kallis, Esq., Special Attorney, in behalf of the United States.

Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homans, Esq., and Edward M. Antevil, Esq., appearing for the Defendants.

In the absence of the Judge, and by agreement of Counsel, there are marked for identification papers as follows:

Those so marked are for identification only.

Those marked without objection are introduced in evidence.

[fol. 3812] Mr. Wright: We will offer the Loew franchise that has been marked as Exhibit 618 for identification. Plaintiff's Exhibit 618 for identification is a photostatic copy of franchise for the Loew's and Schine, dated October 1, 1936, for 1936-37 through 1940 seasons, together with a series of amending letters, dated December 22, 1937. It is relating to Ogdensburg clearance. Letter December 22, 1937, relating to Oneonta clearance. Letter of December 29, 1937, relating to Piqua, Ohio, and deal sheet, dated August 31, 1937, covering second-run at Strand or Palace, Auburn, N. Y. Deal sheet dated August 7, 1937, covering 1937-38 product, first-run, at State or Civic Theatre, Fostoria, Ohio. Deal sheet, dated August 7, 1937, covering first-run, 1937-38 product, at Princess Theatre, Medina, Ohio. Deal sheet, dated August 7, 1937, covering second-run for 1937-38 product, at Opera House, Ashland, Ohio. Deal sheet, dated August 7, 1937, covering second-run on 1937-38 product at Lyric Theatre, Mount Vernon, Ohio. Deal sheet, dated Au-[fol. 3813] gust 7, 1937, covering second-run, 1937-38 product, at Strand Theatre, VanWert, Ohio.

Mr. McClennen: Then you will just mark the folder as containing the things you described?

Mr. Wright: And deal sheet, dated July 21, 1937, for seasons 1937-38, 1939-40, for Capitol Theatre, Ilion, N. Y.

(The folder containing documents referred to, previously marked for identification as Plaintiff's Exhibit 618, was received in evidence.)

Mr. Wright: This agreement, dated August 29, 1934, between Vitagraph, Inc., and Schine Theatrical Co., Inc., covering all contracts signed as of that date, was identified as one of the documents produced in the folder marked Plaintiff's Exhibit 644 for identification and is now offered in evidence as Plaintiff's Exhibit 644-A.

(The agreement referred to, dated August 29, 1934, between Vitagraph, Inc., and Schine Theatrical Co., Inc., was received in evidence and marked Plaintiff's Exhibit 644-A.)

Mr. McClennen: It is agreed that Plaintiff's Exhibit 644 for identification, heretofore described in the testimony, [fol. 3814] contains no other agreement for the 1934-1935 season.

Mr. Wright: We will offer this contract, dated September 19, 1934, between Mamyer Corporation and Paramount, for first-run of Group S-6 at Jefferson, Strand or Palace theatres, Auburn, N. Y., which was contained in the folder previously identified as Plaintiff's Exhibit 339, as Exhibit 339-E.

(The contract, dated September 19, 1934, between Mamyer Corporation and Paramount, was received in evidence and marked Plaintiff's Exhibit 339-E.)

Mr. Wright: We will offer in evidence this contract between Vitagraph and Schine, dated January 15, 1937, for second-run, at Regent or Strand, Amsterdam, N. Y., which was contained in folder marked Plaintiff's Exhibit 642 for identification as Plaintiff's Exhibit 642-A.

(The contract, dated January 15, 1937, between Vitagraph and Schine, was received in evidence and marked Plaintiff's Exhibit 642-A.)

Mr. Wright: And we will offer these two contracts, both dated June 17, 1936, between Schine and Fox, for the K-4 [fol. 3815] group for first and second-run, respectively, in Amsterdam, N. Y., which were previously contained in folder marked Plaintiff's Exhibit 324 for identification as Plaintiff's Exhibits 324-A and 324-B, respectively.

(The two contracts, dated June 17, 1936, between Schine and Fox were received in evidence and marked Plaintiff's Exhibits 324-A and 324-B, respectively.)

Mr. Wright: And we will offer the contract for first-run of Group S-5 at Amsterdam, between Kronik and Paramount, contained in folder marked Plaintiff's Exhibit 339 for identification, as Plaintiff's Exhibit 339-A.

(The contract between Kronik and Paramount, Amsterdam, N. Y., referred to was received in evidence and marked Plaintiff's Exhibit 339-A.)

Mr. Wright: And we will offer three contracts, contained in the same folder, made between Amsterdam Consolidated Corporation and Paramount for first-run at Amsterdam,—

for the Group S-6, S-7 and S-8 features, respectively, as Exhibits 339-B, 339-C and 339-D, respectively.

[fol. 3816] (The three contracts between Amsterdam Consolidated Corporation and Paramount at Amsterdam, for Groups S-6, S-7 and S-8 were received in evidence and marked Plaintiff's Exhibits 339-B, 339-C and 339-D, respectively.)

Mr. Wright: We offer the contract between Schine and RKO for first-run at Auburn, N. Y., contained in folder 622 for identification, for the 1933-34 season, as Plaintiff's Exhibit 622-A.

(The contract between Schine and RKO, for 1933-34 season, was received in evidence and marked Plaintiff's Exhibit 622-A.)

Mr. Wright: Will you mark these, please?

(The two contracts referred to were received in evidence and marked Plaintiff's Exhibit 948.)

Mr. Wright: Plaintiff's Exhibit 948 is two contracts, both dated August 20, 1934, between the State Bucyrus Co. and Vitagraph, Inc., for Warner and First National Productions, respectively, in the State Theatre at Bucyrus, Ohio.

Mr. McClennen: Will you mark this as the next defendants' exhibit?

(The papers referred to were marked as Defendants' Exhibit D-148-A, B, C, D, E and F, respectively, for identification.)

[fol. 3817] Mr. McClennen: Defendant's Exhibit D-148 A is a contract, Vitagraph with the State-Bucyrus Company, M. H. Bryer, July 13, 1935, approved July 23, 1935, first-run, and attached to that is "B," the accompanying memorandum, July 13, 1935, signed by "F. J. B." and "C," July 13, 1935, signed by Vitagraph by Brant and State-Bucyrus Company by Bryer, and "D," Warner, State-Bucyrus Company, undated, approved September 5, 1935, and "E," cancellation, December 2, 1935, signed by M. A. Mooney, Branch Manager, and "F," another cancellation, December 11, 1935, signed by M. A. Mooney.

Mr. Wright: We object to Counsel for the defendants offering at this time the contracts that they are as appropriate to their case. We have no objection to the identifica-

tion at this time but we do object to the offer in evidence and I might say if we proceed in this manner we are not going to be able to close the case today.

Mr. McClennen: I have completed all of this kind that I have in contemplation for today and I put it in for con- [fol. 3818] venience, as it is connected with Bucyrus.

Mr. Wright: It is marked for identification. We object to its being admitted at this time. We have no objection to its being identified.

Mr. McClennen: Well, you can put the marking on. [fol. 3819] Mr. McClennen: These papers marked D-148-A to 148-F for identification I now offer, inasmuch as we are proceeding in the absence of the Court for the joint convenience of the Court, plaintiff's counsel and defendant's counsel, as exhibits. I recognize that there is no one present to determine whether they may be marked as exhibits, and it was only for the convenience as the Town of Bucyrus was in the plaintiff's offer that I offered them at this time and persist in the offer to be passed on by the Court when the Court is present if counsel is disposed not to recognize this convenient method of having them in.

Mr. Wright: I will offer in evidence three contracts contained in Exhibit 698 for identification, as Exhibits 698-A, B and C, respectively, which are in their order a first-run contract between Schine and Universal for Corning, New York, dated November 21st, 1933, a second-run contract between the same parties for the same town, December 11, 1933, and a contract for second-run between Gaby and Cohen [fol. 3820] for Corning, dated September 12th, 1933.

(Thereupon three contracts, Universal, Corning, New York, were received in evidence and marked as Plaintiff's Exhibits Nos. 698-A, 698-B and 698-C.)

Mr. McClennen: Note that 698-A has an approval stamp of Universal by J. R. Granger, and the paper is dated November 21st, 1933, recited to be with Schine Theatrical Company, Inc., but has no signature.

Mr. Wright: I next offer a series of contracts contained in the folder identified as Exhibit 637 in evidence as 637-A, B, C, D, E and F, respectively. Each exhibit consists of two sheets, one for First National Productions and the other for Warner Brothers productions. A is dated August

29th, 1934, and is between Schine and Vitagraph for first-run Corning.

637-B bears the same date and is between the same parties and covers second-run, Corning.

637-C is between Gaby and Vitagraph and is dated October 15, 1934, and covers third-run, Corning.

[fol. 3821] 637-D is dated September 14th, 1933, and is between Schine and Vitagraph for first-run, Corning.

637-E is between the same parties and bears the same date and is for second-run, Corning.

637-F is between Gaby and Cohen and Vitagraph and is dated March 28th, 1934, and covers third-run, Corning.

(Thereupon six contracts, each containing two sheets, one for First National and one for Warner Brothers were received in evidence and marked as Plaintiff's Exhibits 637-A to 637-F, inclusive.)

Mr. Wright: I offer in evidence nine contracts from the folder marked for identification as Exhibit 326, as Exhibits 326-A, B, C, D, E, F, G, H and I, respectively.

Mr. McClennen: These are all as to what place, Corning?

Mr. Wright: Yes, this is Corning material.

326-A and B are contracts between Schine and Fox for second-run, Corning, K-3 product, 326-A being for Fox and B representing 20th Century-productions, both dated August 5th, 1935.

[fol. 3822] 326-C is dated August 24, 1936, and is between Gaby & Cohen and Fox for K-3 product at the Plaza Theatre at Corning.

326-D and E are contracts between Schine and Fox, both dated June 29th, 1934, for first and second-run, Corning, respectively on K-2 product.

326-F is dated November 20th, 1934, between Fox and Gaby & Cohen for K-2 at the Plaza Theatre.

326-G is a contract between Schine and Fox, dated August 3rd, 1933, for the Fox Theatre, Corning, K-1 product.

326-H is between Schine and Fox, dated October 23rd, 1933, for second-run of group K-1 in Corning.

326-I is between Gaby & Cohen and Fox, dated December 4, 1933, for second and third-run in Corning, K-1.

(Thereupon nine contracts relating to Corning, Fox, were received in evidence and marked as Plaintiff's Exhibits 326-A to 326-I, inclusive.)

Mr. Wright: I offer in evidence as Exhibit 611-A and B, two contracts from the folder identified as Exhibit 611, [fol. 3823] A being one between Schine and Metro, dated February 14, 1934, for second-run, Corning on 1933-1934 features and B one between Gaby & Cohen and Metro, dated February 20, 1934, for exhibition of 1933-34 features at the Plaza, Corning.

(Thereupon two Metro contracts relating to Corning were received in evidence and marked as Plaintiff's Exhibits 611-A and 611-B.)

Mr. Wright: I offer in evidence as Plaintiff's Exhibits 341-A, B, C, D and E, respectively, five contracts contained in Exhibit 341 for identification, which are as follows:

341-A is dated June 29, 1933, between Schine and Paramount S-4 productions, first-run, in Corning.

341-B is dated April 11, 1933, between Fred Gerber and Paramount for S-4 productions, second-run at the Plaza, Corning.

341-C is dated September 27, 1933, between Schine and Paramount for first-run of S-5 productions in Corning.

341-D is dated December 23rd, 1933, between Schine and [fol. 3824] Paramount for second-run Corning on group S-5.

341-E is between Gerber and Paramount for second-run at Palace, Corning, dated August 26, 1933, for group S-5.

(Thereupon five Paramount contracts relating to Corning, were received in evidence and marked as Plaintiff's Exhibits 341-A to 341-E, inclusive.)

Mr. Wright: With respect to Corbin, Kentucky, I want to offer in evidence four contracts, which have been previously marked for identification 30, 31, 37 and 42, and a document headed "Cancellation or alteration of the contract," previously identified as 39.

(Thereupon Plaintiff's Exhibits previously marked for identification as 30, 31, 37, 39 and 42 were received in evidence.)

Mr. Wright: I want to call attention to the fact, I think, all of these were previously offered and objected to last May or June.

Mr. McClennen: Note that the defendants object as to Exhibit 39 to its reception in evidence as any proof of the truth of the memorandum contained on it. It is our under-

standing that its unlimited admission is covered by the [fol. 3825] ruling heretofore made by the Court, and we note our persistence in the objection to that ruling.

Mr. Wright: I will offer in evidence contract previously marked as Plaintiff's Exhibit 635-A.

(Thereupon contract previously marked as Plaintiff's Exhibits 635-A for identification was received in evidence.)

Mr. Wright: We will offer in evidence as Exhibit 642-A, a contract between Southland Amusement Company and Vitagraph, dated June 30, 1939, for fourth-run in Lexington, 1939-1940 product, at the Opera House, taken from Exhibit 642 for identification.

(Thereupon contract between Southland Amusement Company and Vitagraph was received in evidence and marked as Plaintiff's Exhibit 642-A.)

Mr. Wright: I next offer as Exhibit 611-A, B, C and D, four contracts taken from Exhibit 611 for identification.

611-A is for Warner Brothers productions, dated September 14, 1931, between W. Wood and Warner for the Hippodrome Theatre at Little Falls, first-run.

[fol. 3826] 611-B is two sheets, one for First National productions and the other for Warner Brothers productions, both dated October 25th, 1932, between Vitagraph and Central New York Theatres Corporation, for first-run at Rialto Theatre, Little Falls.

611-C is two sheets, one for First National and one for Warner Brothers productions both dated May 16th, 1933, between Schine and Vitagraph for first-run at Rialto, Little Falls.

611-D is dated August 5th, 1935, between Schine and Vitagraph for first-run, Little Falls.

(Thereupon four contracts pertaining to Little Falls, Vitagraph, were received in evidence and marked as Plaintiff's Exhibits Nos. 611-A to 611-D, inclusive.)

Mr. Wright: I offer in evidence as Exhibits 672-A, B, C, D, E and F, respectively, six contracts taken from Exhibit 672 for identification.

672-A is between William Wood and Columbia for first-run at Hippodrome, Little Falls, dated October 23rd, 1931.

[fol. 3827] 672-B is between Central New York Theatres

and Columbia, dated October 18, 1932, for first-run, Little Falls.

672-C is dated October 30, 1933, between Schine and Columbia, for 1933-1934 season, Little Falls.

672-D is dated November 12th, 1934, between Schine and Columbia, for first-run, Little Falls.

672-E is dated November 18, 1935, and is between Schine and Columbia for Little Falls, 1935-1936 season.

672-F is dated July 23rd, 1936, between Schine and Columbia for 1936-1937 features at Little Falls.

(Thereupon six Columbia contracts pertaining to Little Falls were received in evidence and marked as Plaintiff's Exhibits Nos. 672-A to 672-F, inclusive.)

Mr. Wright: I offer in evidence as Exhibits 324-A, B and C, three contracts taken from Exhibit 324 for identification, which are, 324-A, a contract between Fox and Schine, dated August 3rd, 1933 for first-run, Little Falls.

[fol. 3828] 324-B, a contract between the same parties, dated June 23rd, 1934, for first-run, Little Falls.

324-C, a contract between the same parties, dated August 5th, 1935, for first-run, Little Falls.

(Thereupon three Fox contracts pertaining to Little Falls were received in evidence and marked as Plaintiff's Exhibits Nos. 324-A, 324-B and 324-C.)

Mr. Wright: I offer in evidence as Exhibit 604-A, B, C, D and E, five contracts from Exhibit 604 for identification.

604-A, dated September 30, 1932, between Central New York Theatres Corporation and Metro for first-run, Little Falls.

604-B, dated May 23rd, 1933, between Schine and Metro for first-run, Little Falls with rider attached dated May 23rd, 1933.

604-C, dated August 10, 1933, between Schine and Metro for first-run, Little Falls, with rider attached, dated August 10, 1933.

604-D, dated October 5, 1934, between Schine and Metro, [fol. 3829] first-run, Little Falls.

604-E, dated July 11, 1935, between Schine and Metro, first-run, Little Falls.

(Thereupon five Metro contracts pertaining to Little Falls were received in evidence and marked as Plaintiff's Exhibits No. 604-A, to 604-E, inclusive.)

Mr. Wright: I offer in evidence as Exhibit 399-A, B, C, and D, respectively, four contracts from Exhibit 399 for identification.

399-A is a contract between Fox Metropolitan Play Houses, Inc., and Paramount for group S-3 in Little Falls.

399-B is a contract between Schine and Paramount for first-run, Little Falls, group S-4.

399-C is a contract for first-run, Little Falls, group S-5, signed only by George Lynch.

399-D is dated September 19, 1934, between Schine and Paramount for first-run, Little Falls, group S-6.

(Thereupon four Paramount contracts pertaining to Little Falls, were received in evidence and marked as Plaintiff's Exhibits 399-A to 399-D, inclusive.)

[fol. 3830] Mr. Wright: I offer in evidence as Exhibits 604-F, G and H, three contracts from the folder identified as Exhibit 604.

604-F being a contract between Schine and Metro, dated October 30, 1931, for first-run, Lockport, 1931-1932 features.

604-G being dated December 29, 1932, between Reliance Theatres, Inc., and Metro for first-run, Lockport, 1932-1933 features.

604-H being between Schine and Metro, dated July 31, 1933 for 1933-1934 features, first-run, Lockport.

(Thereupon three Metro contracts pertaining to Lockport were received in evidence and marked as Plaintiff's Exhibits 604-F, 604-G and 604-H.)

Mr. Wright: For Mount Vernon, Ohio, we have four contracts between E. W. Long and Son, and Metro which were produced by him but after the time that Long was on the stand. They should have been identified at that time, but we want to offer them now. It is understood those are contracts made with Metro.

Mr. McClennen: These you say came from Mr. Long's file?

[fol. 383] Mr. Wright: That is my understanding, that those were produced by him rather than Metro. I did not have them at the time he was examined.

Mr. McClennen: These will take a new number?

Mr. Wright: Yes, they will take the next Plaintiff's exhibit number.

Mr. McClennen: If you will describe them to me. These will be 949-A, B, and so on?

Mr. Wright: I think we might as well number them consecutively.

Mr. McClennen: All right.

Mr. Wright: 949 is dated May 16, 1938 and is between Long and Metro for 1937-1938 product, second-run, Mount Vernon.

950 is dated May 16th 1938, betwen the same parties for second-run, Mount Vernon on 1938-1939 product.

951 is dated December 14, 1936, between the same parties and is for second-run, Mount Vernon, 1936-1937 features.

952 is between the same parties, dated December 3rd, 1936, and is for second-run, Mount Vernon, for the "Great Ziegfield."

Mr. McClennen: Just one picture?

Mr. Wright: The "Great Ziegfield."

[fol. 3832] (Thereupon four Metro contracts pertaining to Mount Vernon were received in evidence and marked as Plaintiff's Exhibits Nos. 949, 950, 951 and 952.)

Mr. Wright: I offer in evidence as Exhibit 635-A, B, C and D, respectively, four contracts from the folder identified as Exhibit 635.

635-A consists of two sheets, one covering Warner Brothers productions and the other First National productions, both dated September 5, 1934, between Vitagraph and C. O. Federick, covering first-run, Norwalk, Ohio, at Moose Theatre.

635-B is between Vitagraph and Loyal Order of Moose, dated July 16, 1935, for first-run of Warner Brothers productions at Norwalk.

635-C is dated August 7, 1935, between Norwalk Theatre Corporation, signed by George Lynch for first-run, First National productions at Forum Theatre, Norwalk.

635-D is dated March 24th, 1936, between Belpik and Vitagraph for both First National and Warner Brothers productions at Forum Theatre, Norwalk.

[fol. 3833] (Thereupon four Vitagraph contracts pertaining to Norwalk, Ohio, were received in evidence and marked as Plaintiff's Exhibits 635-A to 635-D, inclusive.)

Mr. Wright: Here are two Norwalk Columbia contracts, that I do not have an identification number for. I believe

they were both produced by Max Rose from the Columbia files.

953 is between Schine and Columbia, dated Sept. 26, 1936, for first-run, Norwalk, at Forum Theatre, for 1936-1937 season.

954 is between Loyal Order of Moose and Columbia, dated August 9, 1935, for first-run, Norwalk, at Moose Theatre for 1935-1936 season.

(Thereupon two Columbia contracts pertaining to Norwalk were received in evidence and marked as Plaintiff's Exhibits Nos. 953 and 954.)

Mr. Wright: The next is a contract between Schine and Columbia for Norwich, New York, which is dated July 23rd, 1936, and I believe was produced by Mr. Rose at the same time the contracts which were produced and offered in evidence during Mr. Smalley's cross-examination.

[fol. 3834] (Thereupon contract between Schine and Columbia for Norwich, New York, was received in evidence and marked as Plaintiff's Exhibit No. 955.)

Mr. Wright: And we will offer in evidence Paris, Kentucky contract between Fox and Schine, dated December 13, 1938, which was previously marked for identification, as Exhibit No. 219.

(Thereupon contract previously marked as Plaintiff's Exhibit No. 219 for identification, was received in evidence.)

Mr. Wright: We offer in evidence as Plaintiff's Exhibit 604-I, contract from Exhibit 604 for identification, between Van Wert Amusement Company and Metro, dated September 27th, 1934, for 1934-19335 features, first run, Van Wert.

(Thereupon contract between Van Wert Amusement Company and Metro, was received in evidence and marked as Plaintiff's Exhibit 604-I.)

Mr. Wright: We will offer in evidence as Plaintiff's Exhibit 606-A and B, respectively, two contracts from Exhibit 606 for identification, which are:

606-A is one dated July 11th, 1935, between Glove City [fol. 3835] Amusement Company and Metro for first-run Van Wert, 1935-1936 features.

606-B is dated December 31st, 1936, between Carl Moore and Metro for second-run, Van Wert, 1936-1937 season.

(Thereupon two Metro contracts pertaining to Van Wert were received in evidence and marked as Plaintiff's Exhibit 606-A and 606-B.)

Mr. Wright: We offer in evidence as Plaintiff's Exhibits 635-A and B, respectively, contracts from Exhibit 635 for identification.

635-A consists of two sheets, one for Warner Brothers and the other for First National productions, both between Van Wert Amusement Company and Vitagraph, dated September 7, 1934, for first-run in Van Wert.

635-B, contract between Belpik and Vitagraph, dated August 10, 1935, for Van Wert, for the Warner Brothers and First National productions.

(Thereupon two Vitagraph contracts, pertaining to Van Wert, were received in evidence and marked as Plaintiff's Exhibits 635-A and 635-B.)

[fol. 3836] Mr. Wright: We offer in evidence as Plaintiff's Exhibits 399-A and B, two contracts from Exhibit 399 for identification.

399-A is dated September 12th, 1934, between Van Wert Amusement Company and Paramount for first-run, Van Wert, on group S-6.

399-B, between Belpik and Paramount for Van Wert on group S-8, dated April 15, 1936.

(Thereupon two Paramount contracts, pertaining to Van Wert, were received in evidence and marked as Plaintiff's Exhibits No. 399-A and 399-B.)

Mr. Wright: Then we will offer this contract between Schine and Paramount, dated September 19, 1935, for group S-7, Van Wert, and previously identified as Exhibit P-45 for identification.

(Thereupon contract, previously marked for identification as Exhibit P-45, was received in evidence.)

Mr. Wright: I offer in evidence as Exhibits 344-A, B and C, three contracts taken from Exhibit 344 for identification, which are:

344-A is dated August 25th, 1936, between Carl Moore [fol. 3837] and Paramount for second-run, Van Wert on Group S-8.

344-B is dated November 23rd, 1937, between Schine and Paramount for second-run, Van Wert, on group S-9.

344-C is dated September 22nd, 1938, between Schine and Paramount for second-run, Van Wert on groups S-10.

(Thereupon three Paramount contracts, pertaining to Van Wert, were received in evidence and marked as Plaintiff's Exhibits Nos. 344-A, 344-B and 344-C.)

Mr. Wright: We offer in evidence as Exhibit 324-A and B, two contracts taken from Exhibit 324 for identification, 324-A, being dated October 9, 1935, between Belpik and Fox for group K-3 at Van Wert, Ohio.

324-B is dated March 12th, 1935, between Van Wert Amusement Company and Fox for group K-3, Van Wert, Ohio.

(Thereupon two Fox contracts, pertaining to Van Wert, Ohio, were received in evidence and marked as Plaintiff's Exhibits Nos. 324-A and 324-B.)

Mr. Wright: We offer in evidence as Exhibits 330-A, B and C, three contracts taken from Exhibit No. 330, for [fol. 3838] identification, which are:

330-A, is dated December 18, 1936, between Carl Moore and Fox for second-run, Van Wert on K-4.

Exhibit 330-B, is dated June 24th, 1937, for second-run, Van Wert on K-5, between Moore and Fox.

330-C, is dated January 31, 1938, for second-run, Van Wert, K-6, between Moore and Fox.

(Thereupon three Fox contracts, pertaining to Van Wert, were received in evidence and marked as Plaintiff's Exhibits 330-A, 330-B and 330-C.)

Mr. Wright: I have here two Columbia contracts for Van Wert, which I believe were produced by Max Rose after the previous identification. One of them is between Moore and Columbia for Van Wert for the 1935-1936 season, dated April 8th, 1935.

957 is dated September 26th, 1936, between Schine and Columbia, for first-run, Van Wert, 1936-1937 season.

(Thereupon two Columbia contracts, pertaining to Van Wert, were received in evidence and marked as Plaintiff's Exhibits 956 and 957.)

Mr. McClennen: Note on Exhibit 956 that the run is "Only run Van Wert."

[fol. 3839] Mr. Wright: We are now offering in evidence the United Artists' agreements, which were identified as Plaintiff's Exhibits 122 to 161, inclusive.

(The United Artists' agreements, previously marked for identification as Plaintiff's Exhibits 122 to 161, inclusive, were received in evidence.)

Mr. Wright: We are offering in evidence a document previously identified as Plaintiff's Exhibit 312, but are substituting therefor a photostatic copy which has attached to it the clearance schedule referred to in Exhibit 312, and are asking to have the photostat attached to the schedule marked as Plaintiff's Exhibit 312 in evidence. The letter is December 22, 1939.

(The photostat with attachment referred to, dated December 22, 1939, was received in evidence and marked Plaintiff's Exhibit 312.)

Mr. Wright: We will offer the documents previously identified as Plaintiff's Exhibits 281, 313, 314 and 903, all of which relate to United Artists clearance for the Schine Circuit.

[fol. 3840] (The documents relating to United Artists clearance for Schine Circuit, previously marked for identification as Plaintiff's Exhibits 281, 313, 314 and 903 were received in evidence.)

Mr. Wright: Mark these with the next exhibit numbers.

(Schedule dated November 16, 1938, was received in evidence and marked Plaintiff's Exhibit 958.)

(List of clearances dated February 19, 1941 was received in evidence and marked Plaintiff's Exhibit 959.)

Mr. Wright: Plaintiff's Exhibit 958 is schedule dated November 16, 1938, signed on behalf of United Artists by B. N. Stearn and Schine Enterprises by E. A. Lynch, which was produced by the defendants.

Plaintiff's Exhibit 959 is a list of clearances dated February 19, 1941, headed "United Artists Clearances, 1940-41," signed by B. N. Stearn, on behalf of United Artists and L. Goldstein, on behalf of Schine Enterprises, produced by the defendants.

We will offer this exhibit, previously marked Plaintiff's Exhibit 717 for identification, which is United Artists

[fol. 3841] release schedule as Plaintiff's Exhibit 717 in evidence.

(The United Artists release schedule, previously marked as Plaintiff's Exhibit 717 for identification was received in evidence.)

(Whereupon a recess was taken until 2 o'clock P. M.)

[fol. 3842] After Recess: 2 o'clock P. M.

Appearances: As before noted.

(Proceedings continued in the absence of Judge Knight by agreement.)

Mr. Wright: We will now offer in evidence the agreements that were previously marked for identification as Plaintiff's Exhibits 96, 97, 111, 113, 117, 118, 120 and 121, under the same numbers.

Plaintiff's Exhibit 96 refers to exhibits attached thereto, marked A, B, which are not attached. I assume that they can be furnished and attached to that exhibit or you can substitute a complete copy.

Plaintiff's Exhibit 97 also refers to Exhibits A and B, which were not attached, and I assume those can be supplied.

(Thereupon the agreements previously marked Plaintiff's exhibits 96, 97, 111, 113, 117, 118, 120 and 121 for identification were received in evidence.)

Mr. Wright: I will offer in evidence as Exhibit 687 the letter and attached release schedule for Paramount Pic-
[fol. 3843] tures, which was previously identified as Plaintiff's Exhibit 687.

(Thereupon the letter and attached release schedule for Paramount Pictures, previously marked Plaintiff's Exhibit 687 for identification was received in evidence.)

Mr. Wright: And I will offer in evidence Plaintiff's Exhibit 619, the Metro release schedules previously identified as Exhibit 619.

(Thereupon the Metro release schedules previously marked Plaintiff's Exhibit 619 for identification were received in evidence.)

Mr. Wright: And I will offer in evidence as Exhibit 645 the Warner First National releases, previously identified as Plaintiff's Exhibit 645.

(Thereupon the Warner First National releases, previously marked as Plaintiff's Exhibit 645 for identification, were received in evidence.)

Mr. Wright: I will offer in evidence the Fox release schedules as Plaintiff's Exhibit 337, which are contained in the folder previously identified under that number.

[fol. 3844] (Thereupon the Fox release schedules, previously marked as Plaintiff's Exhibit No. 337 for identification, were received in evidence.)

Mr. Wright: Then I will offer in evidence as W- 33 (17) the two-sheet contract, dated August 29, 1934, between Schine and Vitagraph for third-run at the State or Dixie Theatres, Rochester, N. Y., which was previously identified as W-33 (17).

(Thereupon the contract, dated August 29, 1934, between Schine and Vitagraph, previously marked as Plaintiff's Exhibit W-33(17), was received in evidence.)

Mr. Wright: And I will offer in evidence as Exhibit W-33(16) the two sheet contract for Warner Bros. and First National Productions, dated August 29, 1934, between Schine and Vitagraph for fourth-run at the Liberty or Riviera, at Rochester, N. Y., which was previously marked for identification, under the same number.

(The contract for Warner Bros. and First National Productions, dated August 29, 1934, previously marked as Plaintiff's Exhibit W-33(16) for identification was received in evidence.)

[fol. 3845] Mr. Wright: And I will offer in evidence as Exhibit W-18 the contract between Schine and Vitagraph for fourth-run at Liberty or Riviera at Rochester, N. Y., dated July 24, 1935, previously identified under the same number.

(The contract between Schine and Vitagraph, dated July 24, 1935, previously marked as Plaintiff's Exhibit W-18, was received in evidence.)

Mr. Wright: And I will offer in evidence as Exhibit W-19 the contract dated July 24, 1935, between Schine and Vitagraph for fourth-run at the State or Dixie theatre, Rochester, N. Y., previously identified under that number.

(The contract dated July 24, 1935, between Schine and Vitagraph, previously marked as Plaintiff's Exhibit W-19 for identification, was received in evidence.)

Mr. Wright: I will offer in evidence as Exhibit F-87 contract between Schine and Fox, dated June 20, 1934, for repeat runs, at State for Dixie on Group K-2, previously identified under the same number.

(The contract between Schine and Fox, dated June 20, 1934, previously marked as Plaintiff's Exhibit F-87, was received in evidence.)

[fol. 3846] Mr. Wright: I will offer in evidence as Exhibit 613 A and B the two contracts contained in Exhibit 613 for identification. A being dated July 11, 1935, between Schine and Metro, for second-run at Watertown, N. Y., for 1935-36 features, and "B" being contract for the same season between Vorunkis and Metro for subsequent runs, Watertown, dated September 7, 1935.

(Thereupon a contract, dated July 11, 1935, between Schine and Metro, for 1935-36 features, was received in evidence and marked Exhibit 613-A.)

(Thereupon a contract, dated September 7, 1935, between Vorunkis and Metro, for 1935-36 features, was received in evidence and marked Exhibit 613-B.)

Mr. Wright: Then I will offer in evidence as Plaintiff's Exhibit 328 A, B, C and D, respectively, contracts from the folder identified as Plaintiff's Exhibit 328, which are: A, dated August 3, 1933, between Schine and Fox for second-run for Watertown, on Group K-1.

B, dated June 22, 1934, between the same parties, for [fol. 3847] second-run, Watertown, on Group K-27.

C, a two-page contract, dated August 5, 1935, Group K-3, second-run, Watertown.

D, dated June 17, 1936, between the same parties, for K-4, second-run, Watertown.

(Thereupon the contract, dated August 3, 1933, between Schine and Fox, Group K-1, was received in evidence and marked as Plaintiff's Exhibit 328-A.)

(Thereupon the contract, dated June 22, 1934, same parties, Group K-27, was received in evidence and marked as Plaintiff's Exhibit 328-B.)

(Thereupon the contract, two pages, dated August 5, 1935, Group K-3, was received in evidence and marked as Plaintiff's Exhibit 328-C.)

(Thereupon the contract, dated June 17, 1936, same parties, for K-4, Watertown, was received in evidence and marked as Plaintiff's Exhibit 328-D.)

Mr. Wright: I offer in evidence as Plaintiff's Exhibit 343 A, B, C, D, E, F and G, contracts from Exhibit 343 for identification, which are:

A, one dated 11-29-33, between Schine and Paramount for Group S-5, second-run, Watertown.

B, dated September 19, 1934, same parties, same run, [fol. 3848] for Group S-6.

C is dated September 13, 1935, same parties, same run, Group S-7.

D, dated April 10, 1936, same parties, same run, Group S-8.

E, superseding contract dated August 3, 1936, same parties, same run, same season.

E, October 28, 1937, same parties, same run, Group S-9.

G, September 22, 1938, same parties, same run and Group S-10.

(Thereupon the contract from Exhibit 343 for identification dated 11-29-33, between Schine and Paramount for Group S-5, was received in evidence and marked Plaintiff's Exhibit 343-A.)

(Thereupon the contract dated September 19, 1934, same parties, for Group S-6, was received in evidence and marked Plaintiff's Exhibit 343-B.)

(Thereupon the contract, dated September 13, 1935, same parties, Group S-7, was received in evidence and marked Plaintiff's Exhibit 343-C.)

(Thereupon the contract, dated April 10, 1936, same parties, Group S-8, was received in evidence and marked Plaintiff's Exhibit 343-D.)

[fol. 3849] (Thereupon the contract superseding contract dated August 3, 1936, same parties, same run, same season, was received in evidence and marked as Plaintiff's Exhibit 343-E.)

(Thereupon the contract, dated October 28, 1937, same parties, same run, Group S-9 was received in evidence and marked as Plaintiff's Exhibit 343-F.)

(Thereupon the contract, dated September 22, 1938, same parties, same run, Group S-10, was received in evidence and marked as Plaintiff's Exhibit 343-G.)

Mr. Marcus: Will you mark these, please?

(Thereupon the lease referred to was received in evidence and marked Plaintiff's Exhibit 960.)

(Thereupon the agreement referred to was received in evidence and marked Plaintiff's Exhibit 961.)

(Thereupon another lease referred to was received in evidence and marked Plaintiff's Exhibit 962.)

Mr. Marcus: Plaintiff's Exhibit 960 in evidence is a lease dated the 16th day of September, 1933, of the Opera House, Wooster, Ohio, for the term of two years, beginning September 1, 1933, and ending the 31st day of August, 1935, with the option on the part of the lessee to have the term extended [fol. 3850] for an additional period of three years. The lessor is the City of Wooster, Ohio, and the lessee is the Wooster Theatres, Inc. It is stated that the Director of Public Service and Safety, having duly advertised for bids for five consecutive weeks, the Wooster Theatres, Inc., presented its bid for the leasing of said premises, which bid was the highest and best bid therefor and was accepted.

Plaintiff's Exhibit 961 in evidence is an agreement between the City of Wooster, Ohio, and the Wooster Theatres, Inc. It is executed as of the 3rd day of October, 1935. It provides that in exercising their three-year option the lessee and the lessor agree to certain modifications specified in the agreement.

Plaintiff's Exhibit 962 in evidence is a lease appearing to be made on or about April, 1938, between the City of Wooster, as lessor, and the Wooster City Opera House, the highest and best bidder of the Opera House, Wooster, [fol. 3851] Ohio, for the term of three years, beginning June 1, 1938, and ending May 31, 1941, with an option on the part of the lessee to have the term extended for five years.

Mr. McClennen: It is stipulated that this option was exercised extending the lease to May 31, 1946.

Mr. Marcus: It is stipulated that defendants need not answer plaintiff's request for admission of facts served on October 25, 1944, the defendants having produced leases concerning the items asked for in said request.

Mr. Wright: Mark these for identification.

(Thereupon the sixteen contracts referred to were marked as Plaintiff's Exhibits 963 to 978, inclusive, for identification.)

Mr. Wright: We offer in evidence as Plaintiff's Exhibits 963 through 978, inclusive, sixteen contracts, which are all of the documents produced by 20th Century-Fox Film Corporation in response to paragraph 1 of subpoena returnable October 25, 1944, calling for all contracts for exhibition of [fol. 3852] the following group of films in Syracuse, N. Y.:

"Charlie's Aunt", "Dressed to Kill", "Wild Geese Calling", "Private Nurse", and "Sun Valley Serenade", except for a contract for this group of films for second-run exhibition in the Regent Theatre at Syracuse, which has not yet been located, but which, when received, may be identified and received in evidence as Plaintiff's Exhibit 979.

Then we will offer in evidence the tabulation previously marked for identification as Plaintiff's Exhibit 832, under the same number.

Mr. McClennen: What you have just stated now is your complete description of the exhibits? You are not going into detail beyond that?

Mr. Wright: At this time, no. We can have a description read in.

Mr. McClennen: I didn't ask that. I wanted to make sure that you are not going to, so my notes would conform to the stenographer's.

(Thereupon the tabulation referred to, previously marked as Plaintiff's Exhibit 832 for identification, was received in evidence.)

[fol. 3853] Mr. Wright: And we will offer as Plaintiff's Exhibit 980 the two pages bearing pencil notations, clipped together, and previously identified as Defendants' Exhibits D-114 and D-115, respectively.

(Thereupon the two pages referred to, previously marked as Defendants' Exhibits D-114 and D-115 for identification

were received in evidence and marked Plaintiff's Exhibit 980.)

[fol. 3854] Mr. McClennen: It should be noted that Exhibit 980 is composed of two sheets of paper, one in Mr. Wallace's handwriting and the other in Mr. Smith's handwriting that were shown to the witness and spoken of separately, one as D-114 and the other as D-115 for identification.

Mr. Kallis: Just a moment on that.

Mr. Wright: The notation is there. The record speaks for itself. It is perfectly clear.

We offer Plaintiff's Exhibit 53 in evidence.

Mr. McClennen: Note that the receipt of Plaintiff's Exhibit 53 in evidence is objected to.

Mr. Wright: Do you want this presented to the Court or marked over your objection?

Mr. McClennen: I do not see that it makes any particular difference as long as our objection is there on the record.

(Thereupon Plaintiff's Exhibit No. 53 previously marked for identification was received in evidence.)

Mr. McClennen: I understand these papers have no marking in the present record.

Mr. Wright: It is part of the record of the case. It is [fol. 3855] not a record made in court.

Mr. McClennen: I want to have this record show numbers that are mentioned as put in now.

Mr. Wright: It will.

Mr. McClennen: Well, then, all right, let's have it.

Mr. Wright: We will offer in evidence as Plaintiff's Exhibits F-101 (1) to F-102 (40), inclusive, 40 contracts between Fox and Schine previously identified under the same numbers, and we also offer as Exhibits F-101 (42) and F-101 (43), two contracts between Fox and Schine previously identified under the same numbers. All of these contracts F-101 (1) through F-101 (43), relate to the 1935-1936 season.

Mr. McClennen: Put this note on the record. Mr. Wright's statement of these identification numbers has reference to the identification of them in the taking of a deposition of Mr. Selmser at Gloversville by the plaintiff in April,

1942, and the numbers do not appear elsewhere in this record in this court.

Mr. Wright: What was that statement?

(Statement read.)

Mr. Wright: That's right.

[fol. 3856] (Thereupon 40 contracts between Fox and Schine, previously identified, were received in evidence and marked Plaintiff's Exhibits F-101 (1) to F-101 (40), inclusive, and F-101 (42) and F-101 (43).)

Mr. Wright: We have served a series of notices covering the originals of letters which we have offered from time to time, and we would like to have those letters produced, if you have them, before we complete our offer to the Court.

Mr. McClennen: We have produced as you have asked for them every one that we had that was so asked.

Mr. Wright: Let us go over the list. Letter from H. D. Shreffler, dated January 23rd, 1926, on the letterhead of Castambe Theatre, addressed to Mr. Louis Lazar, Bellefontaine, Ohio.

Mr. McClennen: I could not tell by that description whether you have asked in court for that particular one or not.

Mr. Antevil: That is P-74 for identification.

Mr. Wright: I think P-74 is the copy. We asked for the original. As I recall, the introduction of the copy was [fol. 3857] objected to. While we served notice to produce——

Mr. McClennen: We have not here in the court-room at this moment that particular letter. We have handed you originals in the court-room as they have been asked for.

Mr. Wright: When would you be able to tell us whether you can produce or not this particular document?

Mr. McClennen: Not until we have time to investigate the file to see whether we have it.

Mr. Wright: I would assume that would have been done at the time you received the notice to produce.

Mr. McClennen: I think very likely it was. We had them ready, those that we were able to find, and, as they have been asked for in the course of the proceeding, we have produced them. We were not aware on this particular morning you wanted that letter, and we haven't it here. If we have

it among our papers here, we can produce it tomorrow morning.

Mr. Wright: Suppose we go down the list, then. We also ask for your copy of letter from Louis Lazar, Schine Theatrical Co., and Belpik Theatre Corporation, Belle-[fol. 3858] fontaine, Ohio, dated January 14, 1936, addressed to the Shelby Globe, Shelby, Ohio, relative to deal for rental or possible outright sale of a theatre building in Shelby, Ohio, which is also specified in the notice to produce served on October 11th.

Mr. McClennen: The same comments would apply there. If you give us a list, and will check those that you want us to produce in court tomorrow, we will see if we have them, and produce them if we have.

Mr. Wright: We want all of the letters which have been specified in the notice to produce heretofore served upon you that have not as yet been produced. If you want any additional specification——

Mr. McClennen: Do you mean you are going to put in evidence all these voluminous lists of letters? We don't want to have to go down through a great long list when you are not going to put in a great many of them. By this time, I take it, you know which ones you want to put in, and if you will tell us which those are, we will try to get them, and if they are here, we can get them right away. We will [fol. 3859] have them here in court tomorrow morning.

Mr. Wright: I think we have offered secondary evidence with respect to every one of those letters that are listed.

Mr. McClennen: Then I understand that those you do not have any particular desire for us to produce.

Mr. Wright: We desire to have them produced in view of the objection made that what we offered was not an original, and, in the absence of such production, I assume that objection has no merit.

Mr. McClennen: I am advised that we have no indication that we have ever received the notice from which you have just been reading.

Mr. Wright: I think you are mistaken on that, Mr. McClennen. There is no question about the notice from which I have just read. You have it there.

Mr. McKay: To the best of my recollection I never saw it.

Mr. McClennen: Mr. Wright, the notice that you refer to has on it two letters. Those two letters, if we found

them, would be over in the office, and we can have them here [fol. 3860] tomorrow morning. We cannot have them earlier than that, and those are the only two letters that we know of covered by a notice to produce which has been served on us. It certainly is the only notice that I can recall that has come to my attention.

Mr. Wright: Mr. Schulz advises me he thinks that other notice was sent by mail, and he is checking to see what was done in that connection.

Mr. Rogers: This is before Mr. McClennen was in the case.

Mr. Wright: Yes, that is right.

Mr. McClennen: If you have got a list that you can hand us of the original that you really want produced in the case, we can check and see whether we have those or any of them here, and if we have them here, we can produce them tomorrow morning, but I want a list to go by.

Mr. Wright: Mark these. In marking them, just mark the pink feature copy, not the pink copy on shorts or news. Just the pink feature. That will be one in each folder.

Mr. McClennen: Those will be new consecutive numbers?

Mr. Wright: Yes.

Mr. McClennen: I think the record should show what your [fol. 3861] exhibit number is. Will you put in the date of the contract, the name, for example, Loew's to Schine?

Mr. Wright: We might cover that by a statement all of these are Loew or Schine contracts for a particular season.

Mr. McClennen: These are all Loew's?

Mr. Wright: Yes, and have him note the towns and runs.

Mr. McClennen: If you will put into the record that they are all Loew's contracts to Schine and the respective exhibit numbers or dates, and put in the dates and the towns and the run.

Mr. Wright: It should be noted these are all 1940-1941 season.

[fol. 3862] (Thereupon 83 contracts between Loew's and Schine for the 1940-1941 season were received in evidence and marked Plaintiff's Exhibits 981 (1) to 981 (83), tabulated as follows):

Date	Town	Run	Ex. No.
8-22-40	Amsterdam	First	981 (1)
8-22-40	Auburn	Second	981 (2)
8-22-40	Ballston	First	981 (3)

Date	Town	Run	Ex. No.
8-22-40	Bath	First	981 (4)
8-22-40	Canandaigua	First	981 (5)
8-22-40	Granville	First	981 (6)
8-22-40	Mechanicville	First	981 (7)
8-22-40	Corning	First	981 (8)
8-22-40	Cortland	First	981 (9)
8-22-40	E. Rochester or Fairport	First	981 (10)
8-22-40	"	Second	981 (11)
8-22-40	Geneva	First	981 (12)
8-22-40	Glens Falls	First	981 (13)
8-22-40	Glens Falls	Second	981 (14)
8-22-40	Gloversville	First	981 (15)
8-22-40	Gloversville	Second	981 (16)
8-22-40	Hamilton	First	981 (17)
8-22-40	Herkimer	First	981 (18)
8-22-40	Hudson Falls	First	981 (19)
8-22-40	Little Falls	First	981 (20)
[fol. 3863]			
8-22-40	Lockport	First	981 (21)
8-22-40	Lockport	Second	981 (22)
8-22-40	Malone	First	981 (23)
8-22-40	Massena	First	981 (24)
8-22-40	Norwich	First	981 (25)
8-22-40	Newark	First	981 (26)
8-22-40	Ogdensburg	First	981 (27)
8-22-40	Oswego	First	981 (28)
8-22-40	Penn Yan	First	981 (29)
8-22-40	Perry	First	981 (30)
8-22-40	Rochester	Sub.	981 (31)
8-22-40	Rochester	Sub.	981 (32)
8-22-40	Rochester	Sub.	981 (33)
8-22-40	Rochester	Sub.	981 (34)
8-22-40	Rochester	Sub.	981 (35)
8-22-40	Rochester	Sub.	981 (36)
8-22-40	Rochester	Second	981 (37)
8-22-40	Rochester	Second	981 (38)
8-22-40	Rochester	Sub.	981 (39)

Date	Town	Run	Ex. No.
8-22-40	Salamanca	First	981 (40)
8-22-40	Saranac Lake	First	981 (41)
8-22-40	Seneca Falls	First	981 (42)
8-22-40	Tupper Lake	First	981 (43)
[fol. 3864]			
8-22-40	Watertown	First	981 (44)
8-22-40	Watertown	Second	981 (45)
8-22-40	White Hall	First	981 (46)
8-22-40	Ashland, Ohio	First	981 (47)
8-22-40	Athens, O.	First	981 (48)
8-22-40	Bellefontaine, O.	First	981 (49)
8-22-40	Bolling Green, O.	First	981 (50)
8-22-40	Bucyrus, O.	First	981 (51)
8-22-40	Delaware, O.	First	981 (52)
8-22-40	Forstoria, O.	First	981 (53)
8-22-40	Kent or Ravenna, O.	First	981 (54)
Undated	Kent or Ravenna, O.	Second	981 (55)
8-22-40	Medina, O.	7 days after first run, Akron	981 (56)
8-22-40	Mt. Vernon, O.	First	981 (57)
8-22-40	Mt. Vernon, O.	45 days after first	981 (58)
8-22-40	Norwalk, O.	First	981 (59)
8-22-40	Piqua, O.	First	981 (60)
8-22-40	Shelby, O.	7 days after first Mansfield	981 (61)
8-22-40	Van Wert, O.	First	981 (62)
8-22-40	Tiffin	First	981 (63)
8-22-40	Wooster, O.	First	981 (64)
[fol. 3865-6]			
8-22-40	Corbin, Ky.	First	981 (65)
8-22-40	Lexington, Ky.	First	981 (66)
8-22-40	Lexington, Ky.	Second	981 (67)
8-22-40	Lexington, Ky.	Third	981 (68)
8-22-40	Lexington, Ky.	Fourth	981 (69)
8-22-40	Maysville, Ky.	First	981 (70)
8-22-40	Paris, Ky.	First	981 (71)
8-22-40	Pikeville, Ky.	First	981 (72)
8-22-40	Richmond, Ky.	First	981 (73)

Date	Town	Run	Ex. No.
8-22-40	Cambridge, Md.		981 (74)
8-22-40	Easton, Md.	First	981 (75)
8-22-40	Federalsburg, Md.	First	981 (76)
11-9-40	Hurlock, Md.	14 days after Cambridge	981 (77)
8-22-40	Laurel, Del.	7 days after Seaford	981 (78)
8-22-40	Middlesboro, Ky.	First	981 (79)
8-22-40	Milford, Del.	10 days after first	981 (80)
8-22-40	Salisbury, Md.	First	981 (81)
11-9-40	Salisbury, Md.	30 days after first	981 (82)
11-9-40	St. Michaels, Md.	7 days after Easton	981 (83)

[fol. 3867] Mr. Wright: With reference to a notice to produce consisting of seven pages, addressed to Mr. McKay, Mr. Rogers and Mr. McCarthy, calling for the production of certain original letters, our records show that a copy of the notice was mailed to Mr. Rogers on August 5, 1944, and that the original was mailed to Willard McKay on the same date.

Mr. McKay: Let me state that I never received it.

Mr. Homans: When was it mailed?

Mr. Wright: It was mailed August 5, 1944.

Mr. Schilz: I offer in evidence RKO National Release schedules for the season 1933-34, 1934-35, 1935-36, 1936-37, 1937-38, 1938-39, 1939-40, 1940-41, 1941-42. They had previously been offered as Plaintiff's Exhibit 634 for identification. I will offer them under the same number.

(Thereupon the RKO national release schedules, previously marked as Plaintiff's Exhibit 634 for identification, were received in evidence.)

Mr. Wright: Plaintiff offers in evidence documents previously identified as Exhibits 516, 549, 430, 433, 435, 494, 496, 500, 499, and 574.

The offer just made is in addition to the offer made of [fol. 3868] the documents previously identified by the following numbers:

Plaintiff's Exhibits 76, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 176, 178, 179, 190, 216, 218, 226, 227, 228, 229, 230, 236, 243, 259, 273, 282, 283, 286, 288, 292, 300, 307, 308, 310, 318, 319, 321, 322, 323, 338, 356, 361,

363, 366, 367, 368, 369, 370, 374, 381, 384, 385, 386, 387, 388, 390, 393, 396, 397, 412, 413, 425, 426, 444, 488, 497, 518, 519, 526, 527, 528, 530, 539, 542, 554, 559, 560, 561, 566, 567, 574, 597, 598, 599, 600, 601, 662.

And delivered to Judge Knight in accordance with Mr. Wright's letter to Mr. McClennen of October 19, 1944.

(At this point in the proceedings Judge Knight presided.)

Mr. Wright: If the Court please, in addition to the documents that we are marking in evidence, we have now offered an additional group of memoranda——

[fol. 3869] The Court: They have been marked?

Mr. Wright: Yes, previously marked documents. These are documents (handing the documents to the Court) previously marked for identification, which the reporters have already listed.

The Court: Are they objected to?

Mr. Wright: As I understand it, the same objection goes to these that was made to those your Honor already has in your possession.

Mr. McClennen: As I understand it now, just before your Honor came in, Mr. Wright made offer of the 89 identified exhibits which have heretofore been handed to your Honor.

The Court: Yes.

Mr. McClennen: And these that he now, I will say, adds to that group, beginning with identification number 546 and ending with identification number 574, these last being arranged in order of dates, and we make the objection that we have heretofore made and discussed with your Honor as to all of these.

The Court: Yes.

Mr. Wright: Before closing our case I want to call your [fol. 3870] Honor's attention to testimony which I think is judicially noticeable before your Honor because it was taken in a prior proceeding in this case before your Honor. I call your attention to it now in case there is any question as to the accuracy of the transcript which was made. If there is we will, of course, offer to make proof of what was said.

I refer specifically to the testimony of John A. May that was given at the hearing before your Honor on March 30, 1944, in connection with the motion for leave to pur-

chase the Liberty Theatre at Cumberland, Maryland. The part I want to call your attention to is as follows:

Page 55:

"John A. May was called as a witness on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Goodwin:

Q. Will you state your name?
A. John A. May.
Q. Your address?
A. Gloversville, New York.
[fol. 3871] "Q. Your occupation?
A. Comptroller of the Schine Chain Theatres."

Then on page 66, under Cross-examination by me the following testimony appears:

"Q. You are familiar with the policy in your company in acquiring theatres, are you not? You have something to do with that policy?
A. Yes, sir.
Q. And that policy is, is it not, wherever you go into any situation, to secure control of it by getting control of all of the first-run theatres, isn't that correct?
A. That is sometimes advisable from a business standpoint. It isn't necessary.
Q. You found advisable and have actually achieved that result in 75 per cent or 80 per cent of the situations in which you operate theatres, isn't that true?
A. Possibly, yes.
Q. Well, it is true, is it not?
A. Yes.
Q. If your acquisition and policy in Cumberland follows the course that your acquisition and policy has previously followed in other situations you will wind up in possession [fol. 3872] of all of the first-run theatres there, isn't that correct?
A. Barely possible.
Q. It is not only possible, it is quite probable, is it not?"

This goes to page 67:

"A. Well, it is not necessarily so.

Q. You regard that a desirable situation from Schine's standpoint, do you not, to control all the first-run theatres in the town?

A. Yes."

Then the further question is asked:

"Q. As far as you are concerned there is no public advantage to competition in any situation, is that right?

A. I would not say so, no. Competition sometimes is desirable in some lines of business.

Q. As far as Schine is concerned, it is more desirable to have a monopoly, is it not?

A. Not necessarily.

Q. The fact that you have achieved those monopolies in 75 per cent of your situations you say you regard as purely accidental?"

It goes to page 68:

"A. It depends upon your definition of what 'monopoly' is.

[fol. 3873] Q. I wish you would answer my question.

A. I don't like the word 'monopoly.'

Q. Well, whether you call it a monopoly or whether you call it a closed town, or use any other name that you like for it, it has been a definite policy of Schine's, has it not, to acquire all of the first-run theatres in any particular community in which Schine enters?

A. Yes, sir."

The Court: Was this testimony taken on the question of the disposition of the Liberty Theatre?

Mr. Wright: This was taken at the time—that is right—in connection with the motion to acquire the Liberty Theatre, made by Schine, and this is being offered as an admission made by one of the defendants here in the course of that hearing.

The Court: Is there an objection to that?

Mr. McClennen: We make the objection that has been made in other similar situations, that this related to a local acquisition and not something which had any tendency to restrain or monopolize interstate commerce as evidenced

by the fact that your Honor, if I am rightly informed, hearing the testimony, permitted the acquisition of this theatre [fol. 3874] and, so far as it is offered as an admission by a defendant, we ask that it be confined to the defendant May as he was the only one who made this admission, if it was an admission, and only if he was called as a witness in court and not in any respect in the course of the business of the defendants or any of them.

The Court: The first question you raised is the question of this being local. That would have to apply here because we are dealing with this statement as concerns the whole charge of conspiracy. Now, if the Court was right in holding that these are not local transactions and this so-called admission relates to the whole thing, the admission, or so-called admission, as to whether this is a monopoly or policy of the Company, relates to the policy and monopoly as to interstate actions. In other words, if this is not a local transaction, then, of course, the admission applies to all—[fol. 3875] in relation to the way the monopoly, if it is called a monopoly—what was said in that respect?

Mr. McClennen: Evidently I have not well expressed myself to make myself clear to your Honor.

The Court: You are urging the same objection you urged before right through the case, that it is a local transaction, to be applied to each situation by itself?

Mr. McClennen: More than that. The matter before the Court was the question whether we should be permitted to acquire a theatre in Cumberland, if I rightly understand the situation.

The Court: Yes.

Mr. McClennen: And the witness was before the Court on that one subject.

The Court: Yes.

Mr. McClennen: Of that one local transaction. That did not clothe him with any representative capacity to deal with other defendants. He was required in his duty to the Court to answer the questions that were put to him, in that he was not engaged upon the business of the defendants; he was before your Honor as a witness, and what he said on [fol. 3876] the witness stand is not an admission with respect to any other defendants, and particularly because the issue then up for consideration was the one of the right to acquire a particular theatre in a particular locality.

The Court: I think you have got to look beyond that, at what was said. No matter what case was being examined it would be entirely—nothing in any way connected with these proceedings—the sale of any theatres. Assuming that in some other suit he had testified that such-and-such was the policy of the Company wouldn't his declarations be—wouldn't that be binding and be material as far as the Company is concerned?

Mr. McClennen: I most respectfully submit now that when a man is called in another suit to testify he is not engaged in the business of the defendants in any way and while his expressions may be binding upon him and while if he were called here now he could be confronted with this as cross-examination, this is now being put in by the [fol. 3877] plaintiff as the Government's testimony.

The Court: Yes.

Mr. McClennen: And it is not a part of the province of a witness on the stand to make admissions binding upon anybody but himself as admissions and that is part of the objection which we urge, and I merely want——

The Court: Of course, it looks to me as though the proceedings start with the sale of the Liberty Theatre. That is entirely an independent suit.

Mr. McClennen: I understand that that was entirely independent of this suit.

The Court: I am so considering, anyway, and of course it is unusual. Isn't that the fact that that is an independent proceeding?

Mr. Wright: If the Court please, the decree under the order under which the proceedings were held was, of course, an order entered in this suit and these proceedings, as I understand them, were a part of this suit, and when your Honor entered an order approving the Liberty acquisition it was entered appropriately without prejudice to such rights as we might have to the divestiture of that theatre. [fol. 3878] The Court: Yes.

Mr. Wright: Upon the completion of the entire case, upon the merits.

The Court: I know, but does that have to do with the question of monopoloy or violation of the Anti-Trust Law here? It appears to me like it is an independent proceeding.

Mr. Wright: Regardless of whether you regard it as an independent proceeding or part of the proof, Mr. May took the witness stand for the purpose of assisting in or estab-

lishing a record upon which your Honor would permit one or more of these defendant corporations to acquire that theatre. As such he was clearly embarked on the business of the corporation and I don't think there is any question at all about the admissibility here of such admissions as he might have made while engaged in so testifying, both as to him individually and as to this corporation.

The Court: Of course, it is in the nature of an admission.

Mr. Wright: As a defendant in the suit. He, of course, may take the stand on behalf of the defendants and explain [fol. 3879] what he said there, in any way that he chooses, but we are entitled to——

The Court: You are producing the evidence upon the admission—upon the trial of this side of the case?

Mr. Wright: Yes.

The Court: They have the right, of course, have they not, to cross-examine Mr. May?

Mr. Wright: The theory under which admissions of a defendant are admissible in evidence, as I understand it, not based upon any assumption that cross-examination was available but because the defendant had made a statement which is inconsistent with the position he assumes in the lawsuit, and as to such statements, whenever they are made, under circumstances as this one was made, for example, in a judicial proceeding under oath when he was about the business that we are concerned with here, the statement is clearly admissible for that purpose and an admission against interest.

The Court: What do you say in answer to his statement [fol. 3880] that the admission is not binding upon the corporation?

Mr. Wright: I would like to call your Honor's attention to Section 340 of Article 33 of the Civil Practice Act of this State, which states:

"The admission of a member of an aggregate corporation who is not a party"—this goes further than that we are concerned with here——

"shall not be received as evidence against the corporation unless it was made concerning and while engaged in a transaction in which he was the authorized agent of the corporation or unless it was made while a member of such corporation and testified as a witness concerning a trans-

action of the corporation when the official record of such testimony shall be received."

That, it seems to me, is precisely the situation that we have here with the additional element that Mr. May himself was a defendant and that testimony was taken not in [fol. 3881] some unrelated lawsuit but in this lawsuit itself.

The Court: Wouldn't it have to be binding in that proceeding?

Mr. Wright: I think not, if the Court please. This deals with the general question of the admissibility of admissions.

The Court: With respect to a corporation, that is the point of the rule. That does not go to the question of admission as concerns the different proceedings. Of course, while what has been done, they started this action years ago, has nothing to do with the acts themselves; the sale of a theatre during a trial.

Mr. Wright: Assuming it was an independent proceeding, I cannot conceive of any circumstances under which a defendant or an officer of a corporation could make a binding admission if he cannot make one when he is testifying on behalf of the corporation in connection with a matter concerning corporate business under oath. I would suppose those were circumstances under which admissions of the highest possible probative value could be made.

The Court: That corporate proceeding?

[fol. 3882] Mr. Wright: In that proceeding. The testimony is not received because it is an admission, it is received because a witness there testifying just like any other witness. The only time we are concerned with the admissibility of such testimony as an admission is when it is offered in another city from the original one in which it occurred and was made.

The Court: Isn't the point of that rule that the admission of the officer is an admission as against the corporation? That is the purpose of that rule, isn't it?

Mr. Wright: Yes. I take it the rule extends to the doctrine of admissions, generally. If it were merely considering what happens in a suit, or a corporate officer testifies on behalf of the corporation, there isn't any question, of course, but what that evidence, even without any statute, or considering the law of admissions, is admissible and binds his corporation. What we are concerned with here is the extent of such statements that an officer of a

corporation makes at some other time and place are ad-
[fol. 3883] missible against him and the corporation in a subsequent proceeding, and I understand the law to be that where the officer makes a statement in the course of performing the corporation business, which relates to that business and which he is authorized to make, then that statement may be, when properly proved, used as an admission against him and the corporation in any subsequent proceeding, in so far as it may be relevant to the issues then being tried. I do not understand that Counsel himself has suggested that there is any disagreement as to that rule of law.

Mr. McClennen: Well, there is. If you did not understand it you misunderstood what I just said.

I submit, if your Honor please, that the theory of admissions being binding upon somebody else than the man who spoke is that they constitute the words of the corporation, if you please, which he was authorized by the corporation to utter. When a witness is called to the witness-
[fol. 3884] stand he is not engaged on the business of the corporation. He is engaged in the business of giving testimony to a court and if the corporation knew that the witness was of the opinion or belief that a certain thing was the fact, and the corporation and the corporate officers, other than himself, were of the belief that it was not the fact, that if in that testimony it would be possible for what he said to be an admission by the corporation then it would be within the power of the corporation and the right of the corporation to say at this juncture, "You are not to open your mouth because we do not believe that what you believe is the fact."

Now, manifestly, they cannot do it when he is testifying in a court, and the very illustration that I use shows that when testifying in court he is not engaged upon the business of the corporation and he is not authorized to make admissions in the proceeding in which he appears; what he says is effective, not as admissions, but as testimony, and it
[fol. 3885] goes no further.

It is a fundamental of the law of admissions by a co-operator, an officer of the corporation, that an admission made after the period of the conspiracy in question or before the beginning of the conspiracy in question, is not a part of the carrying out of that conspiracy.

It is not an admission that is binding upon the other parties. There are those initial and terminal limits.

[fol. 3886] Now, when this witness was testifying in court, he was not engaged in the carrying out of any conspiracy. He was engaged in giving the testimony in accordance with his belief on the facts concerning which he was interrogated. That was not an admission by the corporation when he made that admission. It was a statement of a piece of evidence by himself, and it went no further.

The Court: Are we very far apart on this question here, whether we treat it as an admission by the defendant corporation, or whether we treat it as admission by the individual? The position of the company is shown here.

Mr. Wright: I think we are agreed it is clearly admissible. The only question is whether or not, the extent to which it is admissible against other defendants than the defendant May.

Mr. McClennen: What an astounding remark. We are not clearly agreed on any such thing.

The Court: I think the discussion centers around the question largely of whether it is binding on the Company.

[fol. 3887] I thought perhaps we did agree on that phase of it. That is the question here, how it should be treated if received. That is right, is it not?

Mr. McClennen: I had just stated, if your Honor please, as my position just before this remarkable statement was made that we contended that a statement by Mr. May on the witness-stand had its effect as testimony in the cause in which he was testifying, and that it stopped there.

The Court: Your position is that it is not receivable at all under any circumstances by reason of that fact?

Mr. McClennen: My position here is, first, that it is not receivable at all, and, second, that if it were received it should be received as an admission of Mr. May only, if it is received as an admission.

The Court: That is just exactly what I inquired about. If it is received as his statement, simply as his admission, rather than an admission of the company itself.

Mr. McClennen: If your Honor please, I was not addressing myself to anything that your Honor had said. I was [fol. 3888] addressing myself to Mr. Wright's statement that I agreed to something which I do not agree to.

The Court: I thought we agreed in that respect. Do you have something further?

Mr. Wright: There is one case I think on this question of admissibility against the corporation, that is, Pan American against U. S., 273 U. S., 456. That was the case in which Mr. Doheny, while President of the oil company appeared before a Senate Investigating Committee. In the course of his testimony he made certain statements. At a subsequent trial in which he was a defendant——

The Court: Individually?

Mr. Wright: No, in which his corporation was a defendant.

The Court: And individually, also?

Mr. Wright: I believe he was also an individual defendant. In that trial over objection his statements before the Committee were received in evidence, and the Court held that under the facts and circumstances in that case Doheny had acted for the corporation within the scope of his authority, when he testified before the Committee and [fol. 3889] his statements were, therefore, properly taken as admissions by that corporation and were admitted against the corporation in the subsequent suit. Now, we have the same situation here. Mr. May did not appear in this court to buy that theatre himself. He appeared voluntarily for the purpose of satisfying your Honor that his company should be permitted to acquire that theatre. I don't think there is any question at all under the Pan American case that the testimony is admissible.

The Court: I will receive the evidence, and I will determine the question of the weight of the evidence, that is all.

Mr. McClennen: May I, before this matter is cold, call your Honor's attention, that in the case cited the corporation was under investigation by a Senate Committee. That was the business of the corporation that was then up. In the proceeding that was before your Honor, your Honor was not trying or purporting to try, or attempting to try, and that was not a part of the proceeding, a transaction of the corporation concerning an alleged conspiracy or policy [fol. 3890] of business. The matter up for consideration by your Honor was whether it was proper for this corporation to obtain this local theatre in this one place at this time, and your Honor decided that it was proper that that should be done. Now, I am not making these statements by way of seeking to persuade your Honor further on the

ruling you have already made, but so that it may be perfectly clear on the record, the distinctions which I am making.

The Court: I will receive it, but I will give it such weight as I determine. Anything besides exhibits now?

Mr. Wright: I have some additional matters, yes.

The Court: What is your plan about tomorrow. Do you want to go on tomorrow? Do just as you men agree. It makes no difference to me.

Mr. McClennen: I think it would very seriously inconvenience my associates to be here tomorrow, and, therefore, I am afraid my suggestion to your Honor is an admission that I was not permitted or authorized to make.

The Court: What is that?

[fol. 3891] Mr. McClennen: I will say that when I suggested to your Honor that we go on tomorrow, I made an admission which I was not authorized by my associates to make.

The Court: I would just as soon not be here.

Mr. Wright: Before we adjourn, I would like to give your Honor a memorandum, a copy of which I have given to counsel.

The Court: What is that concerning?

Mr. Wright: Which concerns decisions of the Appeal Board under the consent decree with respect to certain clearances that are in evidence in this case. The decisions themselves I do not believe are judicially noticeable, because they are not officially reported, but I have procured certified copies which I would like to have marked in order that there——

The Court: Relating to what?

Mr. Wright: These decisions are five in number. They relate to clearances there established in evidence in this case by contracts which are in evidence, and they are decisions which hold those clearances to be unreasonable.

[fol. 3892] The Court: You mean Schine clearances?

Mr. Wright: Yes.

The Court: How do they come up?

Mr. Wright: They come up under the consent decree, the consent decree which was attached to the memoranda set up a system of arbitration whereby an exhibitor who complained that clearance held over his theatre by another exhibitor with respect to pictures of one of the consenting companies, either Fox, Loew, Metro, R. K. O., or Warner was un-

reasonable, he would have the right to arbitrate the question before an arbitrator and secure an award to that effect if the clearance was unreasonable. The decree then set up a system of review of these arbitrators' decisions by a three-man board which was appointed by the District Court of New York for that purpose, and these decisions I am referring to here are the decisions of that three-man Appeal Board reviewing awards of arbitrators made in proceedings brought by independent exhibitors who complained about certain clearances held by Schine Theatres.

[fol. 3893] The Court: Schine, of course, was not a party to the consent decree.

Mr. Wright: That is quite true, but these arbitration rules provide when the exhibitor files his complaint, he shall give notice to other exhibitors affected, and then the other exhibitors affected have the opportunity to intervene and become a party. In all but one of these cases, Schine exercised that intervention privilege and was a party.

The Court: You don't mean to be binding——

Mr. Wright: Not at all, nothing more than such persuasive value as their intrinsic merit may give them upon a reading by your Honor.

Mr. McClennen: On this statement of Mr. Wright, I submit your Honor should not read them. In 1939 there was presented to this Court and your Honor, the suit we are now trying, and in that there were allegations made concerning the reasonableness of clearances. The issue has been opened and is now open before your Honor. These decisions are not brought as res adjudicata, as just stated by Mr. Wright. If they are not res adjudicata, they are merely [fol. 3894] somebody else's view about these clearances. Whether these clearances are reasonable or not, is to be taken by your Honor on evidence of the facts. Now, you cannot be assisted in the slightest by knowing that some gentlemen, be they members of the Appeal Board or some other position, entertained a certain view concerning those clearances. They were not experts on the subject. They have not been called as witnesses where they could be cross-examined as to what they knew about what they were doing, as to whether the case was properly tried before them, as to whether the facts on which they reached their conclusions were all the facts, and I submit that——

The Court: Are these the reports of the arbitrators or the reports of the appeal?

Mr. McClennen: This is the decision of the Appeal Board, sometimes confirming and sometimes not the action of the arbitrator in reaching his conclusion, and all of them, with one exception, after May 19th, 1942. Whoever they are by, I submit your Honor's mind should not be affected at all by what somebody else thought upon the issue which is [fol. 3895] an issue to be decided by you, and that they should not even be looked at by your Honor. They can be of no assistance whatever. They contain views and opinions of men not experts on the subject.

The Court: Supposing there were an article in Harper's Review or some other monthly magazine, some local article, should I read it?

Mr. McClennen: If your Honor would be willing to read it in this case, we would like to give you an article in The Saturday Evening Post that made a survey of these very clearances and reached some conclusions, and if this sort of thing is admissible, why, that would be a matter that might be at least of interest to your Honor. I submit your Honor should not look at it.

The Court: I will let you submit what you want, and as I said before, I have to pass on the question myself independent of anybody else as far as the issue here. If it is not res adjudicata, I am not bound by any action taken. What else have you got today?

Mr. Wright: I think that will conclude our case, sub-[fol. 3896] ject to a check.

Mr. McClennen: These I understand do not go in evidence in this case.

Mr. Wright: Merely for the purpose—the purpose of marking them is simply to——

The Court: I supposed you were making them as part of the brief. You refer to them in the brief?

Mr. Wright: If it might be understood that these are correct and true copies of the decisions in question, there is no need to have them marked in evidence.

The Court: Oh, no, they are not part of the evidence. Submit it the same as a brief is submitted.

Mr. Wright: The only purpose for marking them would be to eliminate the question of lack of judicial noticeability.

The Court: If you can take judicial notice of them. Of course, they do not need to be marked.

Mr. Wright: If there is no objection on that ground, they need not be marked.

Mr. McClennen: If they are not to be evidence in the case, it becomes unnecessary to consider whether you can take judicial notice or not. We protest that they are not before your Honor.

The Court: I am not receiving them as any evidence of [fol. 3897] any fact, any matters they contain. Simply as I understand it in the nature of a brief to the Court of a situation or holding, that is all.

Mr. Wright: That is correct, your Honor. There is one more thing I should like to call your Honor's attention to, that is, the testimony, certain testimony of the witness Burke at the same hearing on March 20th, 1944, to which I——

The Court: What is the name?

Mr. Wright: Thomas H. Burke, at the hearing of March 20th, 1944. Mr. Burke, if your Honor recalls, was the man who owned the Liberty Theatre, which was involved in the supposed acquisition at the time. He testified in that proceeding as a witness called on behalf of the defendants, and the part of his testimony that I wanted to bring to his Honor's attention which I think is also judicially noticeable by your Honor by virtue of its having been given in a proceeding in this suit, is as follows——

Mr. McClennen: Before you read it, I submit this should [fol. 3898] not be read to the Court, that is not admissible.

The Court: What do you claim for it?

Mr. Wright: Briefly the testimony that I am referring to is that which refers to events prior to the entry of the order. Testimony that was developed on cross-examination.

The Court: Transactions by Burke with Schine or his representative?

Mr. Wright: With Schine and with Warner. There was testimony on cross-examination with reference to a so-called sellaway of the better Warner pictures during 1941, and also of conversations between Burke and Mr. May with reference to acquisition of the Liberty in the same year. The admissibility here, or the consideration of the testimony here, I think, depends entirely on whether your Honor views the record there made as a part of this suit. If your Honor takes the position that this testimony was not given in this proceeding, then I think it is true that we would have to call Mr. Burke as a witness in order to make proof. However, I believe that it clearly appears that the proceeding in which

[fol. 3899] the testimony was given was a proceeding in the course of this suit.

The Court: I think it is going too far, because that testimony was not given in the light of any—pendency of any action in this court. It is a separate action, than the testimony of Mr. May. This is a statement of a third party.

Mr. Wright: That is right.

The Court: Well, I don't think it can be received. Anything further?

Mr. Wright: I think that is all, subject to a check of the marking of documents. There have been a number of documents that we have not had actually marked.

The Court: Do you want to go on next week Monday?

Mr. McClennen: Yes, your Honor.

The Court: I think we will have to put it on at 2 o'clock. I have a long argument in the morning. It would be safer to put it down at 2 o'clock.

Mr. McClennen: As I understand it, Mr. Wright, the evidence is now closed subject to a checking of papers——

Mr. Wright: Subject to a ruling——

[fols. 3900-3905] Mr. McClennen: I was about to say that, of course, your Honor has not yet ruled on that long list of exhibits and, of course, that is still open, but barring those two things, the checking of the exhibits, and with that the plaintiff's case is ended.

The Court: All right. We will adjourn until 2 o'clock Monday.

(Whereupon a recess was taken until Monday, October 30th, 1944, at 2 o'clock P. M.)

[fol. 3906] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223

UNITED STATES OF AMERICA

vs.

SCHINE CHAIN THEATRES, INC., et al., Defendants

Continuation of trial October 30th, 1944, at 10:30 o'clock.

APPEARANCES:

Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Philip Marcus, Esq., Special Assistants to the Attorney General, and Milton Kallis, Esq., Special Attorney, in behalf of the United States.

Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homans, Esq., and Edward M. Antevil, Esq., appearing for the Defendants.

[fol. 3907] PROCEEDINGS

In the absence of the Judge, and by agreement of Counsel, there are marked for identification papers as follows:

Those so marked are for identification only.

Those marked without objection are introduced in evidence.

Mr. McClennen: I hand you herewith, Mr. Wright, as requested, lease of June 15, 1933, Lawrence M. Wooley, Executor under the Will of Norman L. Bates, to G. C. Theatre Corp., of property known as Richardson Theatre, corner of East First and Oneida Streets, Oswego.

May 1, 1935, letter exercising option for three years from July 31, 1935;

July 5, 1938, lease of same to same of same property.

June 17, 1940, extension, same to same, of same property, for one year, ending July 31, 1941.

June 30, 1941, notice of extension for one year from July 31, 1941.

Mr. Wright: We will ask to have the lease dated June 19, [fol. 3908] 1933, and the attached exercise of option, dated May 1, 1935, marked as Plaintiff's Exhibit 982.

Mr. McClennen: Note the usual objection, local transaction exclusively.

(Thereupon the lease dated June 19, 1933, referred to was received in evidence and marked as Plaintiff's Exhibit 982.)

Mr. Wright: We will ask to have the lease dated July 5, 1938, marked in evidence as Exhibit 983.

(Thereupon the lease dated July 5, 1938, referred to was received in evidence and marked as Plaintiff's Exhibit 983.)

Mr. Wright: The agreement dated June 17, 1940, as Plaintiff's Exhibit 984 and the letter dated June 30, 1941, as Exhibit 985.

(Thereupon the agreement, dated June 17, 1940, referred to was received in evidence and marked as Plaintiff's Exhibit 984.)

(Thereupon the letter, dated June 30, 1941, referred to was received in evidence and marked as Plaintiff's Exhibit 985.)

Mr. Wright: We will ask to have the Columbia release schedules for the seasons 1938-1939 through 1941-1942, in-
[fol. 3909] clusive, previously identified as Exhibit No. 682 marked in evidence under the same number.

(Thereupon the Columbia release schedules previously marked as Plaintiff's Exhibit 682 for identification were received in evidence.)

Mr. Wright: Mark this stipulation, dated October 17, 1944, with respect to film rentals paid by the exhibition of Paramount features at Auburn, N. Y., during the 1932-33, 1933-34, and 1934-35 motion picture seasons, as the next exhibit.

(Thereupon the stipulation, dated October 17, 1944, re Paramount features at Auburn, N. Y., was received in evidence and marked Plaintiff's Exhibit 986.)

Mr. Wright: Mark the stipulation regarding total film rentals paid by the Schine Circuit to Fox for the seasons 1935-36 through 1939-40, respectively, as Plaintiff's Exhibit 987.

(Thereupon the stipulation re rentals, Schine Circuit to Fox, referred to was received in evidence and marked Plaintiff's Exhibit 987.)

Mr. Wright: And the stipulation relating to the total feature film rentals paid by the Schine Circuit to Loew for the [fol. 3910] seasons 1935-36 through the seasons 1939-40, respectively, as Plaintiff's Exhibit 988.

(Thereupon the stipulation re rentals Schine Circuit to Loew referred to was received in evidence and marked as Plaintiff's Exhibit 988.)

Mr. Wright: And the stipulation relating to feature film rentals received by Paramount from the Schine Circuit for the seasons 1934-35 through 1939-40, respectively, is marked as Plaintiff's Exhibit 989.

(Thereupon the stipulation re rentals Schine Circuit to Paramount referred to was received in evidence and marked as Plaintiff's Exhibit 989.)

Mr. Wright: The stipulation as to total film rentals received from the Schine Circuit by RKO for the seasons 1935-36 through 1939-40 will be Exhibit 990.

(Thereupon the stipulation re rentals Schine Circuit to RKO referred to was received in evidence and marked as Plaintiff's Exhibit 990.)

Mr. Wright: The stipulation relating to the feature film rentals received from Vitagraph, Inc., for the seasons 1934-35 through 1939-40, respectively, will be Plaintiff's Exhibit No. 991.

[fol. 3911] (Thereupon the stipulation re rentals Vitagraph, Inc., referred to was received in evidence and marked Plaintiff's Exhibit 991.)

Mr. Wright: I will offer in evidence the stipulation concerning the directorship in the Universal Pictures Company, Inc., held by J. Myer Schine during the period April 19, 1934, to March 3, 1938, and the connection of Willard S. McKay with that Company during the period 1931 through 1940.

(Thereupon the stipulation re directorship referred to was received in evidence and marked Plaintiff's Exhibit 992.)

Mr. Wright: I will offer in evidence this stipulation of September 28, 1944, as to service of prints by Columbia, United Artists, Universal, Fox, Loew, Paramount, RKO and Warners to defendant's theatres in Virginia, Delaware, Maryland and Kentucky, from exchanges in Washington, D. C., Philadelphia, Pa., and Cincinnati, Ohio.

(Thereupon the stipulation, dated September 28, 1944, referred to was received in evidence and marked as Plaintiff's Exhibit 993.).

Mr. Wright: We are offering in evidence as Plaintiff's [fol. 3912] Exhibit 994 the stipulation offered by Counsel for defendants with respect to the theatres operated by the various operating corporations listed in the answer to interrogatory No. 15.

(Thereupon the stipulation re theatres operated by various operationg corporations referred to was received in evidence and marked as Plaintiff's Exhibit 994.)

Mr. Wright: Will you mark the request for admission of facts served on the defendants by the plaintiff with the next number? This request is dated June 6, 1944.

(Thereupon the request for admission of facts, dated June 6, 1944, referred to was marked as Plaintiff's Exhibit 995 for identification.)

Mr. Wright: And defendants' first answer to said request marked for identification as Exhibit 995 will be Exhibit 996, and which was filed some time in August, 1944.

(Thereupon defendants' first answer to request for admission of facts referred to was marked as Plaintiff's Exhibit 996 for identification.)

Mr. Wright: We will also have the supplemental answer to request for admission of facts filed by defendants and [fol. 3913] dated September 25, 1944, and served September 24, 1944, marked with the next exhibit number for identification.

(Thereupon the supplemental answer to request for admission of facts, dated September 25, 1944, referred to was marked Plaintiff's Exhibit No. 997 for identification.)

Mr. Wright: We will offer in evidence paragraph 19 of Plaintiff's Exhibit 995 for identification and paragraph 19 of Exhibit 997 for identification.

(Paragraph 19 of Plaintiff's Exhibit 995 for identification reads as follows:

"19. On November 10, 1941 there were no theatres in the following towns other than those operated by the defendant exhibitors or in which the defendant exhibitors owned a financial interest.

New York

Amsterdam
Bath
Ballston Spa
Canandaigua
Carthage
Cortland
E. Rochester
Fairport
Gloversville
Hamilton
Herkimer
[fol. 3914] Hudson Falls
Ilion
Little Falls
Newark
Lockport
Malone
Ogdensburg
Oneonta
Oswego
Penn Yan
Perry
Salamanca
Saranac Lake
Seneca Falls
Whitehall
Mechanicville
Clifton Springs

Kentucky

Maysville
Paris
Richmond
Middlesboro
Corbin
Lexington

Delaware

Laurel
Milford

Virginia

Appalachia

Ohio

Ashland
Athens
Bellefontaine
Bucyrus
Delaware
Fostoria
Kent
Mount Vernon
Medina
Norwalk
Piqua
Ravenna
Tiffin
Wooster
Bowling Green

Maryland

Cambridge
Easton
Federalsburg
Hurlock
St. Michaels.")

(Paragraph 19 of Exhibit 997 for identification reads as follows:

"19. Admitted, reserving the right to show the facts to be otherwise if investigation so discloses and becomes material.")

Mr. Wright: And we are offering paragraph 20 of Ex-
[fol. 3915] hibit 995 for identification and paragraph 20 of Exhibit 997 for identification.

(Paragraph 20 of Plaintiff's Exhibit 995 for identification reads as follows:

"20. The following are towns in which no theatres other than those in which the defendant exhibitors have owned a financial interest have been operated at any time since August 7, 1931, or since the defendant exhibitors acquired a financial interest in a theatre or theatres in said towns, if such acquisition occurred after August 7, 1931:

New York

Bath
Ballston Spa
Mechanicville
Whitehall
Granville
Oneonta
E. Rochester
Fairport
Gloversville
Perry
Canandaigua
Newark
Hudson Falls
Hamilton
Ilion
Ogdensburg
Saranac Lake
Herkimer
Salamanca
Penn Yan

Maryland

Cambridge
Easton
Federalsburg
Hurlock
St. Michaels

Delaware

Milford
Laurel

Ohio

Ravenna
Bowling Green
Piqua

Kentucky

Paris
Richmond
Middlesboro")

[fol. 3916] (Paragraph 20 of Plaintiff's Exhibit 997 for identification reads as follows:

"20. Admitted, reserving the right to show the facts to be otherwise if investigation so discloses and becomes material.")

Mr. Wright: We are also offering paragraph 10 of Exhibit 995 for identification and paragraph 10 of Exhibit 997 for identification.

(Paragraph 10 of Plaintiff's Exhibit 995 for identification reads as follows:

"10. About ninety per cent of the total film rental paid by the exhibitor defendants during the five years preceding the filing of this suit was paid to the eight major distributors.")

(Paragraph 10 of Plaintiff's Exhibit 997 for identification reads as follows:

"10. Denied. It is admitted that the percentage would be well upwards of 75 percent.")

Mr. Wright: We are offering paragraph 98 of Exhibit 995 for identification and paragraph 98 of Exhibit 996 for identification.

[fol. 3917] (Paragraph 98 of Plaintiff's Exhibit No. 995 for identification reads as follows:

"98. That the Answer to Interrogatory No. 16 would be the same now as it was at the time the answer was submitted October 6, 1941.")

(Paragraph 98 of Plaintiff's Exhibit No. 996 for identification reads as follows:

"98. The defendants admit that the answer to Interrogatory No. 16 would be the same now as on October 6, 1941.")

Mr. Wright: And we offer paragraph 99 of Exhibit 995 for identification and paragraph 99 of Exhibit 996 for identification.

(Paragraph 99 of Plaintiff's Exhibit 995 for identification reads as follows:

Town	Population 1930	Population 1940
New York		
Amsterdam	34,817	33,329
Auburn	36,662	35,753
Bath	4,015	4,696
Ballston Spa	4,591	4,443
Buffalo	573,076	575,901
Canandaigua	7,541	8,321
Carthage	4,460	4,207
[fol. 3918]		
Corning	15,777	16,212
Cortland	15,043	15,881
East Rochester	6,627	6,691
Fairport	4,604	4,644
Geneva	16,053	15,555
Glens Falls	18,531	18,836
Gloversville	23,099	23,329
Hamilton	1,700	1,790
Herkimer	10,446	9,617
Hudson Falls	6,449	6,654
Ilion	9,890	8,927
Little Falls	11,105	10,163
Newark	7,649	9,646
Lockport	23,160	24,379
Malone	8,657	8,743
Massena	10,637	11,328
Norwich	8,378	8,694
Ogdensburg	16,915	16,346
Oneonta	12,536	11,731
Oswego	22,652	22,062
Penn Yan	5,329	5,308
Perry	4,231	4,468
Rochester	328,132	324,975
Salamanca	9,577	9,011
Saranac Lake	8,020	7,188
Seneca Falls	6,443	6,452
Syracuse	209,326	205,967
Tupper Lake	5,271	5,451

Town	Population 1930	Population 1940
Watertown	32,205	33,385
Whitehall	5,191	4,851
[fol. 3919]		
Mechanicville	7,924	7,449
Granville	3,483	3,173
Clifton Springs	1,819	1,413
Ohio		
Ashland	11,141	12,453
Athena	7,252	7,696
Bellefontaine	9,543	9,805
Bucyrus	10,027	9,727
Delaware	8,675	8,944
Fostoria	12,790	13,453
Kent	8,375	8,581
Medina	4,071	4,359
Mt. Vernon	9,370	10,122
Norwalk	7,776	8,211
Piqua	16,009	16,049
Ravenna	8,091	8,538
Shelby	6,198	6,643
Tiffin	16,428	16,102
Van Wert	8,472	9,227
Wooster	10,742	11,543
Bowling Green	6,688	7,190
[fol. 3920]		
Kentucky		
Corbin	8,036	7,893
Harlan	4,327	5,122
Lexington	45,736	49,304
Maysville	6[illegible]	6,572
Paris	6,204	6,697
Richmond	6,498	7,335
Pikesville	3,376	4,185
Middlesboro	10,350	11,777
Maryland		
Cambridge	8,544	10,102
Easton	4,092	4,528

Town	Population 1930	Population 1940
Federalsburg	1,369	1,749
Hurlock	765	800
St. Michaels	1,308	1,309
Salisbury	10,997	13,313
Cumberland	37,747	39,483
Delaware		
Laurel	2,542	2,884
Milford	3,719	4,214
Virginia		
Appalachia	3,595	3,010

[fol. 3921] (Paragraph 99 of Plaintiff's Exhibit 996 for identification reads as follows:

"99. Subject to possible corrections on the basis of census figures:

The defendants admit that the populations of the towns listed in this paragraph were as stated.")

Mr. McClennen: Mr. Wright, as requested, I hand you herewith folders marked on the outside in pencil F-2 to F-123. These numbers being the numbering at the deposition taken in Gloversville by the plaintiff in 1942, except those elsewhere, heretofore produced, numbered F-98 and F-101.

Mr. Wright: We are offering in evidence contracts previously marked for identification as F-2 through F-64, inclusive, being contracts between Fox and Schine, being contracts for 1936-37 and subsequent seasons for the following towns and runs:

Exhibit No. in Evidence	Town	Run
F-2	Amsterdam, N. Y.	1st
F-3	"	2nd
F-4	Auburn, N. Y.	1st
[fol. 3922]		
F-5	Bath	First
F-6	Canandaigua	"
F-7	Carthage	"
F-8	Corning	30 days on Plaza
F-9	Corning	2nd

Exhibit No. in Evidence	Town	Run
F-10	Cortland	1st
F-11	Geneva	1st
F-12	Glens Falls	1st
F-13	Glens Falls	2nd
F-14	Gloversville	1st
F-15	Gloversville	2nd
F-16	Hamilton	1st
F-17	Herkimer	1st
F-18	Hudson Falls	1st
F-19	Little Falls	1st
F-20	Lockport	1st
F-21	Lockport	2nd
F-22	Malone	1st
F-23	Massena	1st
F-24	Norwich	1st
F-25	Ogdensburg	1st
F-26	Oneonta	1st
F-27	Oneonta	2nd
[fol. 3923]		
F-28	Perry	As available
F-29	Perry	As available
F-30	Rochester	2nd
F-31	Rochester	14 days over Plaza
F-32	Rochester	As available
F-33	Rochester	As available
F-34	Rochester	14 days on Lyric
F-35	Salamanca	1st
F-36	Saranac Lake	1st
F-37	Seneca Falls	1st
F-38	Tupper Lake	1st
F-39	Watertown	1st
F-40	Watertown	3rd
F-41	Ashland	1st
F-42	Athens	
F-43	Bellefontaine	30 days over Lakeview
F-44	Bucyrus	1st

Exhibit No. in Evidence	Town	Run
F-45	Delaware, Ohio	1st
F-46	Mt. Vernon, Ohio	1st
F-47	Norwalk, Ohio	1st
F-48	Piqua, Ohio	Open booking with Troy
F-49	Lexington, Ky.	2nd
[fol. 3924]		
F-50	Lexington, Ky.	60 days clearance over sub. runs
F-51	Richmond, Ky.	"
F-52	Ilion, N. Y.	30 days ahead of Frankfort
G-53	Ilion, N. Y.	"
F-54	Kent or Ravenna, Ohio	
F-55	" " " "	
F-56	Tiffin, Ohio	Second
F-57	" "	First
F-58	(Exhibit missing)	
F-59	Oswego, N. Y.	First
F-60	Oswego, N. Y.	Second
F-61	Penn Yan, N. Y.	As available
F-62	" " "	" "
F-63	Van Wert, Ohio	First
F-64	Wooster, Ohio	30 days over Orville

(Thereupon the contracts between Fox and Schine, previously marked as Plaintiff's Exhibits F-2 to F-64, inclusive, were received in evidence.)

[fol. 3925] Mr. Wright: The next we are offering in evidence are deal sheets between Fox and Schine, identified as F-102 to 109, inclusive, under the same numbers.

(Thereupon deal sheets previously marked for identification were received in evidence as follows:

Plaintiff's Exhibit F-102, Hamilton.
Plaintiff's Exhibit F-103, Glens Falls.
Plaintiff's Exhibit F-104, Herkimer.
Plaintiff's Exhibit F-105, Hudson Falls.
Plaintiff's Exhibit F-106, Little Falls.
Plaintiff's Exhibit F-107, Malone.

Plaintiff's Exhibit F-108, Athens, Ohio.

Plaintiff's Exhibit F-109, second-run, Oneonta and Gloversville, New York.)

Mr. Wright: We offer deal sheet dated October 27th, 1937, between Fox and Schine for Fostoria, Ohio, to be marked in evidence as F-110, the number under which it was previously marked.

(Thereupon deal sheet dated October 27th, 1937, between Fox and Schine for Fostoria, Ohio, previously marked for identification was received in evidence as Plaintiff's Exhibit F-110.)

[fol. 3926] Mr. Wright: We offer Exhibit F-111, which is a deal sheet for the Princess Theatre, Medina, Ohio, dated 10-11-39.

(Thereupon deal sheet for Princess Theatre, Medina, Ohio, dated 10-11-39, previously marked for identification was received in evidence as Plaintiff's Exhibit F-111.)

Mr. Wright: Exhibit F-112, is deal sheet dated 10-28-36, Palace Theatre, Watertown.

(Thereupon deal sheet dated 10-28-36, Palace Theatre, Watertown, previously marked for identification was received in evidence as Plaintiff's Exhibit F-112.)

Mr. Wright: Exhibit F-113 is a deal sheet dated August 11, 1937, Perry, New York.

(Thereupon deal sheet dated August 11, 1937, Perry, New York, previously marked for identification was received in evidence as Plaintiff's Exhibit F-113.)

Mr. Wright: Exhibit F-114 is deal sheet dated 8-11-37, Penn Yan, New York.

(Thereupon deal sheet dated 8-11-37, Penn Yan, New York, previously marked for identification was received in evidence as Plaintiff's Exhibit F-114.)

Mr. Wright: Exhibit F-115 is deal sheet dated 4-27-37, [fol. 3927] Ilion, New York.

(Thereupon deal sheet dated 4-27-37, Ilion, New York, previously marked for identification was received in evidence as Plaintiff's Exhibit F-115.)

Mr. Wright: We are offering Exhibit F-117——

Mr. McClennen: No 116 at this time?

Mr. Wright: No.

Exhibit F-117 is contract between Fox and Schine for Pikeville, Kentucky, Group K-6.

(Thereupon contract between Fox and Schine for Pikeville, Kentucky, Group K-6, previously marked for identification, was received in evidence as Plaintiff's Exhibit F-117.)

Mr. Wright: Exhibit F-118, same parties, same group, Paris, Kentucky.

(Thereupon contract between Fox and Schine for Paris, Kentucky, Group K-6, previously marked for identification, was received in evidence as Plaintiff's Exhibit F-118.)

Mr. Wright: F-119, same parties, same group, Middlesboro, Kentucky.

(Thereupon contract between Fox and Schine for Middlesboro, Kentucky, Group K-6, previously marked for identification was received in evidence as Plaintiff's Exhibit F-119.)

[fol. 3928] Mr. Wright: Exhibit F-120, same parties, same group, Granville, New York.

(Thereupon contract between Fox and Schine, for Granville, New York, group K-6, previously marked for identification were received in evidence as Plaintiff's Exhibit F-120.)

Mr. Wright: F-121, same parties, same group, Harlan, Kentucky.

(Thereupon contract between Fox and Schine, for Harlan, Kentucky, group K-6, previously marked for identification were received in evidence as Plaintiff's Exhibit F-121.)

Mr. Wright: Exhibit F-122, the same parties, Lexington, Kentucky, groups K-6, 7, 8 and 9.

(Thereupon contract between Fox and Schine, for Lexington, Kentucky, groups K-6, 7, 8 and 9, previously marked for identification were received in evidence as Plaintiff's Exhibit F-122.)

Mr. McClennen: As requested, I hand you what purports to be a copy of a letter dated January 14th, 1936, from Louis Lazar to the Shelby Globe.

Mr. Wright: I will ask to have that marked with the next plaintiff's exhibit number, and we will offer it.

[fol. 3929] Mr. McClennen: The objection is saved.

(Thereupon copy of letter dated January 14th, 1936, from Louis Lazar to the Shelby Globe, was received in evidence and marked as Plaintiff's Exhibit 998.)

Mr. McClennen: Mr. Wright, you have asked us to produce a letter dated January 23rd, 1936, from H. D. Schreffler, to Louis Lazar, Bellefontaine, Ohio, apparently referring to identification P-74. We find no indication of the receipt of such a letter.

Mr. Wright: I offer Exhibit P-74 in evidence.

Mr. McClennen: Note an objection to the receipt of Exhibit P-74 in evidence.

(Thereupon letter dated January 23, 1936, from H. D. Schreffler to Louis Lazar, Bellefontaine, Ohio, previously marked for identification was received in evidence as Plaintiff's Exhibit P-74.)

Mr. Clagett: We offer Plaintiff's Exhibits P-69 and P-70, which have previously been marked for identification.

Plaintiff's Exhibit P-69 is a contract between the Bucyrus Theatre Company, by Phil Charnas, with Paramount, dated September 11th, 1934, for pictures at the Southern Theatre, [fol. 3930] Bucyrus.

Plaintiff's Exhibit P-70 is a contract between Schine Theatrical Enterprise and Paramount, dated September 17th, 1935, for the exhibition of pictures at the Schine or State Theatres, Bucyrus, Ohio.

(Thereupon contract between the Bucyrus Theatre Company, by Phil Charnas, with Paramount, dated Sept. 11th, 1934, previously marked for identification, was received in evidence as Plaintiff's Exhibit P-69.)

(Thereupon contract between Schine Theatrical Enterprise and Paramount dated September 17th, 1935, previously marked for identification, was received in evidence as Plaintiff's Exhibit P-70.)

Mr. Wright: At page 3851 of the transcript it appears that Exhibits 963 through 978, inclusive, were offered in evidence and have actually been marked in evidence, although their reception in evidence was not recorded in the transcript at the time. These are Fox contracts for Syracuse.

Mr. McClennen: Are these different seasons?

Mr. Wright: No, one group of pictures.

Mr. McKay: Five special pictures, the names appear in [fol. 3931] the transcript at page 3852.

(Thereupon Plaintiff's Exhibits Nos. 963 through 978, inclusive, in evidence, as should have been recorded at page 3851 of the transcript.)

Mr. Wright: That, I think, concludes the offers. There are quite a number of marking errors to be corrected. I suppose that can be done at any time, but we might as well note now the ones we have so far noted.

Mr. McClennen: Is it worth while now? That is purely a mechanical operation.

Mr. Wright: The duplicate exhibit number should be noted now.

Mr. McClennen: Well, all right, put it in the record now.

Mr. Wright: The Warner contract in evidence as Exhibit 642-A should be remarked as Exhibit 635-F.

(Thereupon Warner contract received in evidence as Exhibit 642-A is remarked as Exhibit 635-F in evidence.)

Mr. Wright: The Paramount contracts that were marked 399-A, B, C and D should be remarked as 339-E, F, G and H.

(Thereupon Paramount contracts previously marked as Plaintiff's Exhibits 399-A, B, C and D, should be remarked as Plaintiff's Exhibits 339-E, F, G and H, in evidence.)

[fol. 3932] Mr. Wright: The Warner contracts marked as Exhibits 611-B, C and D, should be remarked as 635-G, H and I.

(Thereupon contracts previously marked as Plaintiff's Exhibits 611-B, C and D, were remarked as Plaintiff's Exhibits — G, H and I in evidence.)

Mr. Wright: The Paramount contracts marked as Exhibits 399-A and B should be remarked 339-I and J.

(Thereupon Paramount contracts previously marked as Exhibits 399-A and B should be marked as Plaintiff's Exhibits 339-I and J in evidence.)

Mr. Wright: The Metro contract marked as 606-A should be remarked as Exhibit 604-J.

(Thereupon Metro contract previously marked as Plaintiff's Exhibit 606-A should be remarked as Plaintiff's Exhibit 604-J in evidence.)

Mr. Wright: The Warner contracts marked as 635-A and B should be remarked as —J and K.

(Thereupon Warner contracts previously marked as Plaintiff's Exhibits 635-A and B should be remarked as Plaintiff's Exhibits 635-J and K in evidence.)

Mr. Wright: The Norwalk Warner contracts marked as 635-A through D should be remarked as 635-L, M, N [fol. 3933] and O.

(Thereupon Norwalk Warner contracts previously marked as Plaintiff's Exhibits Nos. 635-A through D should be remarked as Plaintiff's Exhibits Nos. 635-L, M, N and O in evidence.)

Mr. Wright: 635-C-1 and 2, for Warner and Fostoria contracts that are marked as 635-A and B should be stricken out as duplications of contracts offered under other numbers.

That is all the corrections we have now, but I am sure that a further check is going to reveal further discrepancies of that kind. The only thing I can see to do is to take them up with the reporter and you people as they occur.

Mr. McClennen: Now, that closes your evidence, except for something like 100 identified exhibits which the Judge has under consideration to see whether he will let them in or not?

Mr. Wright: That is it. Conceivedly his ruling on those might cause us to offer something further.

(Whereupon a recess was taken until 2 o'clock P.M.)

[fol. 3934] After Recess, 2 o'clock P.M.

Honorable John Knight presiding.

Appearances: As before noted.

The Court: I am sorry I was detained. I had some other business to attend to.

Mr. McClennen: If your Honor please, we were very glad of the extra time. We put in a day's work this morning already in your absence.

There have been put in with the stenographer a lot of exhibits that carry the plaintiff's regular exhibit number through exhibit 998.

The Court: Those were exhibits marked for identification.

Mr. McClennen: Marked as in evidence, to save going over it again.

The Court: Are they new exhibits?

Mr. McClennen: Those that have these new numbers are new exhibits.

The Court: Plaintiff's Exhibits?

Mr. McClennen: Plaintiff's Exhibits.

The Court: These exhibits do not include any submitted to the Court in this folder?

[fol. 3935] Mr. Wright: No, they do not, your Honor.

The Court: They run through 998?

Mr. McClennen: Yes. This completed his case, except the matter of something like one hundred and some identified exhibits that your Honor has under consideration and if your ruling on those exhibits was such that he had to put in more evidence that would still be open, otherwise, the plaintiff's case is at a close, depending upon your ruling on those.

The Court: I want to give them some attention, but before we come to that, I don't know just what the record discloses about the decisions of the arbitrators in these cases before the Arbitrator. What does the record show? I received that some day in some way.

Mr. Wright: The decisions that were handed to your Honor were, I believe, all decisions that the Appeal Board—I don't recall if there were any arbitrators' awards.

The Court: What was it you submitted?

Mr. Wright: What we submitted were decisions of the Appeal Board reviewing decisions of the arbitrators.

[fol. 3936] The Court: The point I am going to make on the rest of those is that they are not a part, that the decisions are of no binding force upon this Court.

Mr. Wright: Yes.

The Court: Submitted as part of the brief is one thing, but what somebody else said, I don't think the Court should recognize that as an adjudication.

Mr. Wright: I think the record is clear in that respect.

The Court: Do you understand that?

Mr. McClennen: I think the record made clear that they were not in evidence. We urged that your Honor should not read them even, because they are decisions on factual matters. They are not decisions on any propositions of law. In that connection I would say that if your Honor is going to read those decisions then in like manner we would like to call to your attention the decision in No. 61.

[fol. 3937] The Court: I will stop you right there. I am not going to consider the decisions except as part of the brief, that is all. If it is submitted as part of the Government's brief, then, of course, you will have an opportunity to answer it. I am not going to examine it now.

Mr. McClennen: A cognate case is No. 61, in No. 61, the Appeal Board decision of March 25th, 1943, in the matter of the arbitration between the Sidney Theatre Corporation and the distributors therein named.

Now, I mention this only because if that territory is to be surveyed, even if in connection with a brief by your Honor at a later date, then this one should be considered also, but we do not offer it or urge it.

The Court: What I said is that you will have an opportunity to reply, if it is submitted. I don't think it should be considered by this Court in any way at this time.

About these exhibits, I have examined a considerable number of these which I think should be received. The main point of my reception of those is they are largely [fol. 3938] communications from Schine or Schine's representatives with the companies, these here, I will give you those. (Referring to group of exhibits.)

By way of illustration, in Exhibit 539, a letter from Mr. Kramer to Mr. Smith, of Warner Brothers, "I have just received the following wire from Mr. Lynch of Schine Enter-

prises," and he quotes the telegram. Is the telegram in evidence?

Mr. Wright: May I see the exhibit?

The Court: Yes.

(Document handed to and inspected by Mr. Wright.)

Mr. Wright: No, I do not believe it is. I don't know that there is a copy of such a telegram available. As far as I know it was never produced.

The Court: What?

Mr. Wright: As far as I know no such telegram was produced.

The Court: This relates to the Bellefontaine situation.

Mr. Wright: Yes.

The Court: What do you claim for that exhibit?

Mr. Wright: Well, this communication shows that on or [fol. 3939] about this date, September, 1932, Mr. Kramer, the Branch Manager of Warner, at Cleveland, advised the General Sales Manager, Mr. Smith, that he had received this request for product from the Schine Enterprises, Inc.

The Court: What does that prove?

Mr. Wright: Well, in this particular connection, I suppose that simply shows the course of business between Schine and Warner, that they advised the information came into the branch that Schine wanted to acquire that product at that time, and that was passed along to the home office. In order to fit the thing into the entire picture, for that situation, I would have to refer back to the Bellefontaine exhibits.

The Court: Standing alone that would not——

Mr. Wright: Standing alone it does not prove anything more than what I have just said.

The Court: It is difficult to connect these up.

Mr. Wright: It is difficult to handle them in this way.

The Court: Unless we receive them all,—there are a great many here.

Mr. Wright: They all have to be considered in connection [fol. 3940] with all the other evidence in connection with the situation.

The Court: On the other hand, you cannot just throw in all the records of the companies here.

Mr. Wright: I was perfectly willing to offer those and have them discussed, each one individually. It was, I

think, at your Honor's suggestion that we filed them all at once.

The Court: I do not know about that. I do not think there is any question about the rule that inter-company communications are properly received in this case, but, at the same time, I think the communications must be connected, or they must be some evidence in and of themselves, or connected with some other part of the testimony, because in this case there is charged a conspiracy with these distributors. I think the authorities hold that particular inter-company communications are receivable under circumstances corresponding to those here.

The rule in the Minneapolis case was one where the Court ruled to the same effect, that the question of conspiracy makes these communications competent.

[fol. 3941] Mr. McClennen: This particular exhibit, Exhibit No. 539, furnishes an illustration of the particular thing that we urge.

We first urge that such an inter-company communication as Exhibit 539 for identification should not be received at all for the reasons extensively set out at pages 3285 to 3288 of the record.

The Court: That is in the memorandum filed with the Court, you mean?

Mr. McClennen: Yes, your Honor, and in the discussion in the record at page 3424 to 3458. If we do not prevail in persuading your Honor that the communications should be excluded altogether, then we urge for the reasons set out in the record at pages 3589 to 3610, that it should not be received as any evidence of the facts stated in it. The fact in this particular case in the statement—or the statement in this particular case is the statement that Mr. Kramer, the Branch Manager, has received a telegram from Mr. Lynch.

Now, we urge that this exhibit, if received, should not be received as any evidence that Mr. Lynch had sent such [fol. 3942] a telegram. This is a specific illustration of what occurs in others of the inter-company, inter-office of the distributor company communications. The objections to the introduction of each of the something like 100 communications now under consideration, we urge that each separately should not be received and each separately that if it is received, the statement be not evidence of what it purports to say.

This happens to be an inter-office communication of one of the companies. The objection would apply to all of them. The request for limitation would apply to all of them. The same objection and the same request for limitation would also apply to each communication between an employee of a distributor and an outsider, whether it be an oral communication or a written communication.

[fol. 3943] The Court: Well, I don't agree with that view. As I expressed myself before, inter-company communications are tied in with, you might say, other testimony in the case. Then I think they are receivable. Of course there are some instances here in which they perhaps are not so, but, as I said at the outset, quite a number of these exhibits examined showed direct contact with the defendant.

Here is a telegram, for instance, Exhibit 243, concerning 1931-32 and 1932-33 product, Schine Enterprises.

Here is another one here, Schine Enterprises, which includes communication from the Schine representative, as I recall it. There are a lot of exhibits here that seem to be—here is a letter, Exhibit 171 for identification, signed by Mr. Lynch to the Fox Film Corporation, New York. A good many of these exhibits include correspondence directly from Schine companies to one of the major companies. Of course, a different rule, I assume, would be applicable to those exhibits, rather, other rules [fol. 3944] apply to others and would not apply to that. There is another exhibit, No. 338, from Mr. Lynch.

Here is a letter to Mr. Schine of this group. I think you will find some more that do not come within the rule which you seek to sustain or claim.

Mr. McClennen: I had understood that your Honor had ruled against our objection and our motion already and I merely, that is, in the earlier time, but I merely referred to it again because your Honor had singled out a particular paper that it seemed to me was a concrete example of what we were talking about. That is, about communications, inter-office communications, of a distributor and communications between a distributor and outsider, whether oral or written.

Now, my remarks were directed, particularly, to Exhibit 539 for identification as a specimen case and I did not mean to over-argue in any way but merely to make clear to your Honor what our objection is.

[fol. 3945] The Court: The branch manager is the third party. I think they are competent if connected up with other proof in the case. There may be some of these—quite a number of them—that I am doubtful about any connection, but, an exhibit like this, I doubt whether it should be received, the one from Mr. Grady, the branch manager.

Mr. McClennen: You say it should be received?

The Court: I doubt, I say. It is to the Kentucky Theatre, Mr. Merrenbloom, and it says, among other things: "The surest way to keep opposition out of your town, Louis, is to have some long-time franchises tucked away in your safe and even though you would probably pay us a little more money under a franchise than you would if you bought from year-to-year, the franchise is still great insurance."

I think a declaration coming from the branch manager is hearsay unless there was something here to show—was it Mr. Lynch?

Mr. McClennen: Would your Honor indicate the number you just mentioned?

[fol. 3946] The Court: Exhibit No. 190.

Mr. McClennen: I should urge that a declaration of that kind in Exhibit No. 190 was of the same character as that in Exhibit 539.

Here is a declaration in Exhibit 539: "It is very evident that some one is taking over the Opera House in competition to the Schine Enterprises." Now, that is a declaration and opinion and in that sense of an extraneous fact and is in the same category in that respect as the declaration in Exhibit 190 to which your Honor has just referred. They both contain statements ostensibly of facts outside, and it is that that we subject that they should not be received as evidence of.

Mr. Wright: If the Court please, I think what the question comes down to here is purely a matter of weight. Now, your Honor may not attach the significance to any of these things that are referred to that we attach to it, or you may not be persuaded that they prove the things we say they prove, but I take it that is a question different from their [fol. 3947] being admissible, in the first instance. They are admissible if they are evidence of the facts which we say we want to draw to your attention. This letter of Grady to Merrenbloom, which your Honor just mentioned, is a record kept between Fox Film Company of a view that

their branch manager expressed with reference to the question of franchises at that time. We think that that fact that that had happened is significant in connection with the interpretation that is ultimately to be placed by your Honor on the purpose and effect on the numerous franchises that have been introduced in evidence, many of them outside the presence of the Court, and this to the extent that that issue is a material one this document is clearly evidence which may be considered in connection with the determination of the issue.

The Court: Well, I think it makes a difference where it comes from. If that statement were made by one who had authority to make it, one of the policy-making members [fol. 3948] of the corporation, or something of that kind, it would be of different weight. But supposing a branch manager or salesman or somebody else writes and says, "Here you have to take a franchise", does that show any authority?

Mr. Wright: Again I say that only goes to the weight. There isn't any question Grady had the right to write Merrenbloom.

The Court: He had the right to sell pictures and that, yes.

Mr. Wright: This is a letter he wrote in the course of performing his duties and it was kept as part of the Fox Company records. Your Honor may properly say this has considerably less weight than a similar letter written by, say, Mr. Sussman or Mr. Kent, the President, but it still is something which your Honor is entitled to consider. It has attached to it what consideration it should be given. It is expressing his view what a franchise would and would not do, and I submit it is clearly admissible for that purpose, even though your Honor may disagree with us as to the [fol. 3949] amount of weight to be ultimately attached to it.

The Court: It does not seem to me—I don't think you can assume the authority of a branch manager to make a statement of that kind. Unless that is connected up.

Mr. Wright: He clearly has authority to solicit independent exhibitors. He writes this letter in the course of soliciting one and this is what he says. Certainly no further proof of authority than that is necessary to make it admissible as far as the weight to be given to it is concerned. Of course, it has less weight than if the same statement had been made by some one who had a greater

measure of responsibility in determining the policies of the Fox Company, but this is still a fact to be considered with numerous other facts as to what the Fox Company did, in determining what its purposes were.

Mr. McClennen: The Exhibit 190 is evidently an urging by the branch manager upon an outside exhibitor, not of the Schine group, that he should take a franchise, and [fol. 3950] offering him that franchise. That fact is wholly apart from the expression of opinion which he makes as to the effect of that. The matter that I am particularly urging is not only that the letter should be excluded but if it is received that it should not be received as evidence of the things stated in it, but only as a communication from the branch manager to what is described as the independent exhibitor, urging a franchise upon him.

The Court: If it is to the effect of a franchise being urged upon him, that is all I think the plaintiff is asking for.

Mr. Wright: No, if the Court please, we offer it as evidence of the fact that it was urged upon him for the reason set forth in the letter. It is evidence of the fact that Grady did express the views that are stated here with respect to the purpose and effect of the franchise on this occasion. Now, that is only one fact which, taken alone, might not be regarded as having any significance at all by your Honor, [fol. 3951] but it is a fact which we are entitled to prove as part of the multitude of facts which we rely on to make our case.

[fol. 3952] The Court: Well, here is another thing here, let us take up some of these that I called attention to. This is the one on the Corbin situation. It sets out the sales of pictures and at the bottom it says——

Mr. McClennen: The number of that, if your Honor please?

The Court: Yes, 393. It says:

"This deal was intended for a new theatre to be built in Corbin by Mr. Scott. In the meantime, the Schine Circuit have acquired the Hipp and Kentucky theatres and have made a deal with Mr. Scott whereby the new theatre will not be built. Mr. Miller negotiated a new contract with Schines, making it necessary to cancel this contract with Mr. Scott, please approve."

What bearing has that?

Mr. Wright: This. I happen to recall the circumstances. Mr. Scott, you will remember, started to build a theatre in

Corbin, and he signed an application for a contract with Universal. The application was taken. He never got an approved contract back. This shows what happened to that contract that he sent to Universal. That contract was [fol. 3953] apparently approved and never sent to him and cancelled, instead, when Schine made the deal with Mr. Scott to stop constructing his theatre. This completes the picture as to what happened to Scott's application.

The Court: My point was this, I did not think there was any disagreement about the facts. It states the cancellation of these contracts after the sale by Scott which is not disputed.

Mr. Wright: We attach some significance to the fact it does show Universal had approved his contract, although they had not delivered the approved contract to him.

The Court: In the meantime Scott had sold out.

Mr. Wright: What Schine was negotiating for and made the deal, of course, apparently while his, Scott's contract was being held up by Universal, and we attach significance to the fact that it was held up.

The Court: You mean as a reason why he sold, because he could not get Universal?

Mr. Wright: Yes, in part.

Mr. McClennen: It would be, of course, impossible to go [fol. 3954] into a discussion of the facts surrounding this matter. This shows that after Mr. Scott had withdrawn from his plan, if his investigations be called a plan, that there was, of course, no occasion for a contract with him for a theatre which he had not and might never have had, so that there was, of course, no reason for sending him a contract which he could not use in any way. The principle doesn't change in any way from what appears in the case of other exhibits that we urge should not be taken as any evidence of the truth of the statements contained in them.

The Court: Well, there is another one that is about Jones and the Lockport matter.

I am going to receive these exhibits. I think there is a doubt about some of these, but I think the Court can take care of those in the consideration of the case. There are so many of them that are not of any special significance that they are material, I will receive them.

Mr. McClennen: That applies to the whole 100?

The Court: Yes.

[fol. 3955] Mr. McClennen: Then without going into them, may we hand them to the stenographer and let him make a record by number, showing the date, from whom to whom?

The Court: I am receiving these on the assumption they are connected up in other parts of the testimony. That is the point. If they are not, I will deal with them later.

(Thereupon certain exhibits previously marked for identification were received in evidence. See page 3983 for detail.)

Mr. McClennen: Then, not seeming to be repeating too much, I now move that these exhibits, and I move it with respect to each one of them, be received only as a communication and not as any evidence of the truth of the statement contained in the communication.

The Court: What does that mean, as evidence of a communication?

Mr. McClennen: Well, I go back to Exhibit 539 as illustrative. We ask that the statement in Exhibit 539, now in evidence, that Lynch had sent a telegram to Kramer be no evidence that Lynch had in fact sent a telegram to [fol. 3956] Kramer.

The Court: All right. How about the balance of the material in the exhibit?

Mr. McClennen: I spoke of that as illustrative of exactly what I am speaking of, that either this is going to be received as evidence that Lynch had sent a telegram or is not to be received as evidence that Lynch had sent a telegram, and I am urging that it be received as no evidence that Lynch had sent a telegram.

The Court: Well, what do you say? What I am trying to get at, that statement is clear; this letter contains a statement that "It is very evident that some one is taking over the Opera House in competition to the Schine Enterprises, and I am passing this information along to you for the reason that if you have made your first-run deal with them, you also can handle the second-run deal as well for the 1931-32, 1932-33 product."

That later statement may have some relevancy, and your application is to strike out everything except that there [fol. 3957] was a communication with somebody. You pick out a statement that there was a telegram sent, and that telegram should not be accepted.

Mr. McClennen: What I intended to say was, first, that the letter should not go in at all, and you have ruled against us on that. Next, that if it goes in, it goes in only as Kramer's communication to the home office that Lynch had sent a telegram, but not as any evidence of the fact that Lynch had sent a telegram, so that dealing with this alone, the case closes barren of any evidence that Lynch had in fact sent any such telegram as is there stated.

The Court: That is very clear, that is the statement. As to whether the Court should consider other statements in the letter, other than referring to the reception of the telegram,—the other one to which attention was called, I think is a similar instance. For instance, this one here to Merrenbloom has two statements. The first might not be objectionable and the last be objectionable, or they both [fol. 3958] might be objectionable from the standpoint of the case.

Mr. McClennen: I had understood that your Honor was not going to allow our motion, but I stated it because this presented a very good opportunity for an illustration and coming, as it does, at the close of the plaintiff's case, and when we are about to go forward with the defendants' case, now, assuming that there is no evidence anywhere else in the case as to whether Lynch had sent a telegram or not, it seemed that we ought to be apprised of the fact whether we are meeting a case in which, by virtue of this letter, there is evidence that Lynch sent that telegram or whether we are meeting a case where, although there is this communication, there is no evidence that Lynch sent such a telegram, so that at the proper time we may argue before you that there is no evidence that Lynch had sent such a telegram. Now, I know of no way of making our position clearer on this than this particular concrete illustration and we are anxious to know whether there is, by virtue of the [fol. 3959] receipt of this letter, evidence in the case that Lynch did send that telegram or no evidence that Lynch did send that telegram.

The Court: Well, I am going to receive it, because I want to know about it. You may be correct in your viewpoint in that respect, but it might not be well taken if there is some evidence in other parts of the proof in the case, I mean, with reference—to illustrate here—there is the question of whether Schine did buy the product for these years for second-run. It appears in the evidence, I mean now, the

fact he sent the telegram, and the fact he got the contract. The telegram would mean a little bit more——

Mr. McClennen: I should submit that the fact that Schine did buy the product or did not buy the product for those years was no evidence that Lynch had sent the telegram as stated in the letter. Now, I understand that your Honor is receiving that letter as evidence that he did send the telegram, and I am now saving my objection to that ruling. [fol. 3960] The Court: Well, you mark these exhibits. Is that all you have?

Mr. Wright: That is all we have, your Honor.

The Court: The plaintiff rests. I had a number of exhibits here.

Mr. McClennen: Well, I take it that the stenographer will mark these all in evidence by the same number as the identification number and in the sequential order of the numbers.

If your Honor please, the evidence for the plaintiff now being closed, I move to strike from the evidence separately the many letters that have been received in evidence over our objection, the many communications so received, both in writing and orally, on the ground that the evidence has not connected the particular communication, whether it be an oral one or a written one, a communication between different employees of a given distributor, one with another, or a communication between an employee of a distributor and an outsider.

I recognize that I am dealing with exactly the same sub- [fol. 3961] ject matter with which your Honor has just been dealing, but for the perfection of our rights we move so to strike separately each one of the communications for the reasons that have been extensively discussed this afternoon before your Honor, and which were stated at pages 3285 to 3288, and pages 3424 to 3458, and pages 3589 to 3610.

The Court: Let me go back to just one question. The first objection you made here was they were not from the defendants' files. I understand you do not raise that question.

Mr. McClennen: If the Court please, these did not come from the defendants' files.

Mr. Wright: There is no question of this particular group coming from the defendants' files.

Mr. McClennen: There is no question that they did not come from the defendants' files.

The Court: They came from the distributors' files.

Mr. Wright: From the distributors' files, I should have said.

Mr. McClennen: Precisely.

The Court: When I looked at it at first I thought you were raising the question there wasn't sufficient proof of [fol. 3962] them coming from the source from which they came.

Mr. McClennen: My motion to strike is brought concretely to attefition with these something like one hundred exhibits that have just been received in evidence, but, of course, it applies to exhibits all the way back from the beginning of the trial.

The Court: You do not raise any question about them having come from the distributors' files?

Mr. McClennen: Those that are shown to have come from the distributors' files, we raise no question about their having come from the distributors' files.

The Court: Is it not the contention of the Government that they all came from the distributors' files?

Mr. Wright: As to these your Honor has been ruling on, it is our understanding, and I believe they were so identified at the time the distributors' representatives were on the stand. I don't understand there is any dispute about that testimony.

Mr. McClennen: Now, I await your Honor's action on the motion.

The Court: Well, I understand that. If these come [fol. 3963] from some agent's files or somewhere else, it creates an entirely different situation. I assumed all the while there was no question raised that these last referred to exhibits came from the distributors' files.

Mr. McClennen: If your Honor please, many of these papers and communications that are the subject matter of this motion were not those that came from the distributors' files; they came from other sources. Those that are shown to have come from the distributors' files are clearly shown. I don't recall it, but I think this last one hundred all came from the distributors' files.

The Court: That is what I am talking about.

Mr. McClennen: I am moving for the exclusion of similar things from the beginning of the trial, so there will be no question about it.

The Court: In my last remark I had in mind only this one hundred, because when I first referred to your memo-

randum of objections I thought you possibly were objecting to the source of these documents. Now, we understand each other.

[fol. 3964] All right, the motion is denied, in all respects denied.

Mr. McClennen: If your Honor please, before going to the opening, I speak of one matter. The witness Mooney testified to prices of admission at his theatre in Bellefontaine, and that the defendants' theatre in Bellefontaine, and in cross-examination practically adopted the newspaper of Bellefontaine's statement of the admission prices that were presented; subsequently, by agreement, out of your Honor's presence, the newspapers were put into the record, or what either side chose to read from them. That is at page 2290 to 2299. I think it was the next day I called your Honor's attention to what had been done, and stated that that must be read to your Honor. We claimed that that should be read as a part of the cross-examination of Mooney, and your Honor stated at page 2327 that I might read them to you at any time. Strictly I think that I should offer them now to your Honor, but it obviously would be much more in-

[fol. 3965] telligible for your Honor to deal with them when we come to evidence concerning Bellefontaine, than to put it in at this particular moment.

The Court: You mean it contradicts his testimony, as I recall it?

Mr. McClennen: Yes, and I just present the offer now, and shall welcome your Honor's permission——

The Court: You are speaking about the newspaper now?

Mr. McClennen: Speaking about the newspaper.

The Court: I think you should offer it as part of your cross-examination, or part of your case.

Mr. McClennen: I deem that properly I should offer it now as part of that cross-examination, but I suggest to your Honor it would be more intelligible to your Honor if the actual reading took place when we got into our case in connection with Bellefontaine, if that is agreeable to your Honor.

Mr. Wright: We would object at this time to it being offered as part of the cross-examination, because the newspaper wasn't produced until after Mr. Mooney left the stand. Some of the data in the newspaper are not self-

[fol. 3966] explanatory. There are gaps in the papers in which no admission prices appear. Even to get a proper

grasp of the situation even as to admission prices, it should have been asked while Mr. Mooney was here.

The Court: You do not deny the prices stated in the paper?

Mr. Wright: No, as to what the paper shows, there isn't any question about that, we have read that into the record, and it is in the record. The only objection I have is as to its being offered as part of the cross-examination. The only thing is I think it *it* should be offer- as part of the defendants' case, because Mr. Mooney was not available when it was considered.

The Court: It is only one item of evidence. I do not think it makes much difference.

Mr. McClennen: Then I offer it now and ask to defer the actual reading of it to your Honor until later.

The Court: Very well.

ARGUMENT

Mr. McClennen: In opening this case to your Honor for the defense, now that the evidence for the plaintiff is closed, [fol. 3967] I would prefer to make no prediction as to the length of time that we will require to present the defense, because it is dependent upon so many circumstances of the future. We believe, as at present advised, that we shall be able to introduce that evidence in less than the 29 days which have been taken for the plaintiff. We shall make it as much less than that as we can, adequately presenting the evidence.

In the long run it will shorten the time consumed if I may outline to some extent the facts as we contend them to be. In stating them as facts, in the course of the opening, I am stating them as facts, so far as the evidence has already established them, and as facts which we propose to show to you by evidence and, therefore, of course, when I refer, in the course of the opening, to a thing as a fact, I recognize that frequently it is not yet a fact proven before your Honor, but is a fact which we expect to offer evidence to prove.

In order to make the facts, as they come forth in the evi- [fol. 3968] dence, clearly significant, it is advisable that we present to you in outline the principles of law which we contend are controlling in this case, so that the true position of any fact in this case may be apparent in the light of the law as we contend that it is.

This case is dependent for a recovery, if any there can be by the plaintiff, upon the Sherman Anti-Trust Act; indeed, the jurisdiction of this Court over the matters presented here is dependent upon that law, if it should so appear that some wrong has been done in any way by the defendants, and we believe and urge that it has appeared so far and will continue to appear that the defendant has done no wrong in the matters under consideration.

[fol. 3969] This, however, is a small part of the situation for, should it appear that there has been a wrong done, it is of no consequence in this case unless there is a violation of the Sherman Anti-Trust Act, and when I use that phrase I, of course, include in it that Act as it may have been amended from time to time up to the present time. There are only two sections of that Act that are brought in play here, the first section and the second section. Of course I lay to one side the later section which gives the remedy. The right, if any, to complain is based upon Sections 1 and 2 and unless there has been that which one or the other of those two sections condemns there is no case here present.

Under Section 1, conspiracy, culmination or contract by the defendant with someone else is essential. This means that so far as Section 1 is concerned it makes no difference that the defendant restrained even interstate commerce unless there is a contract, combination or conspiracy to do so. [fol. 3970] Now, for brevity, I absorb those three words, "contract", "combination and/or conspiracy" into the one "conspiracy", because, manifestly, that is the broadest term of them all.

Our first contention is that there is not, and that at the close of the evidence in the whole case there will be no evidence calling for a finding that there has been a conspiracy by the defendant to restrain interstate commerce. The only conspiracy alleged is a separate conspiracy by the defendant with certain distributors separately. These distributors are not parties to this case.

Now, for brevity, I use the word "Schine", not merely to mean Mr. Schine but to mean, as a rough, convenient expression, those organizations which are defendants here.

The distributors I abbreviate in the same way, into Columbia, Fox, Loew's, Monogram, RKO, Republic, the United Artists, Universal and Vitagraph, or more conveniently called Warner.

[fol. 3971] Mr. Wright: I don't like to interrupt, but there are no allegations in the complaint with respect to Monogram or Republic.

Mr. McClennen: If you had not interrupted I was about to say that there was no allegation of a conspiracy between Schine and Republic or Monogram, and I was telling your Honor the terms that I was going to use to describe the leading distributors in the motion picture industry.

Mr. Wright: I am sorry, I misunderstood you.

The Court: Let Counsel proceed.

Mr. Wright: I thought he was undertaking to summarize the complaint.

The Court: Proceed.

Mr. McClennen: Now, as the case now stands the plaintiff does not make any charge against any distributor. The plaintiff has dropped the charges against the particular distributors, Columbia, Fox, Loew's, Paramount, RKO, the United Artists, Universal and Warner. That repetition makes me fearful that I omitted the name Paramount in the first list.

The plaintiff continues to charge against Schine only [fol. 3972] that Schine conspired with Columbia alone, that Schine conspired with Fox alone, that Schine conspired with Loew alone, that Schine conspired with Paramount alone, that Schine conspired with RKO alone, that Schine conspired with United Artists alone, that Schine conspired with Universal alone, that Schine conspired with Warner alone.

There has been, we contend, in the plaintiff's evidence, no evidence of any one of those eight separate conspiracies and we predict that at the close of the whole evidence there will be no evidence of any one of those eight conspiracies. The term "conspiracy" has a concrete meaning. The fact that it takes so much miscellaneous evidence to establish a conspiracy tends to break down decent regard for true expression in defining what a conspiracy is.

A conspiracy, after all the evidence is in, if one is shown, can be stated as concretely with the same statement of its [fol. 3973] terms and scope as a contract can be stated. In fact, a conspiracy is but a loosely stated form of contract. Essential to conspiracy is the existence of an agreement, not formally stated, not necessarily expressed in words, but derivable from the evidence as a whole, but there must be an agreement, not merely a concurrence of action by a concert of action, an understanding together, not in the sense

of comprehension or appreciation but in the sense of agreement, and unless that agreement is shown the charge of conspiracy must fall.

That agreement must be proved with the same certainty that an ordinary contract is proved. The difficulties of traveling through the evidence, the extent which things on the borderline of immateriality may be considered, none of those considerations make against the fact that the conspiracy must, in the end, be proved by a fair preponderance of the evidence, just as any other fact must be proved.

Under the second section of the Sherman Anti-Trust [fol. 3974] Act there is a provision condemning the monopolization or attempt to monopolize interstate commerce. That is a thing which may happen without the assistance of a co-conspirator. One man, by running a corner in the stock market, without the knowledge or conscious cooperation of any broker, or any one else, may monopolize a certain stock in the market and monopolize interstate commerce in that stock.

Much confusion has been brought into the consideration of this matter by the conception that a unitary position is a monopoly. It is not. In no place probably in shorter compass is this set out than in the extensive opinion in the Standard Oil case, where there is developed clearly that for monopolizing, as the term is used in the Sherman Anti-Trust Act, there must be something which constitutes unreasonable restraint of trade. To put the thing very concretely, a man sees a flourishing, prosperous town, with no [fol. 3975] place of laudable amusement in it. He goes into that town and he builds a theatre. He builds it so well, so adequately, that it pleases the possible patrons in the town. He builds it large enough to accom-odate all those patrons. He goes on for years in that situation. He has not monopolized anything. Now, that is the kind of a thing that avid pursuers of success in the trial of cases like to call a monopoly, like to call the towns in which a man has a monopoly, when all that he has done is to create something that never existed before. To com-at that disposition, to misdescribe a situation, takes time and patience, but the fact remains that that man is not a monopolist.

In this particular industry there has grown up another phrase, a short-cut phrase, that is not harmful in any way until you come to stretch its meaning over something that it does not mean, a closed town. Now, all that is meant, as

these men in this industry use the term, is that there is no [fol. 3976] other theatre in the town. They do not use it in the sense that anybody has closed that town to access by anybody else of sufficient ability, industry, wisdom and resources, to enter that town. I speak of the term because it is inevitable that it shall be used and it is not a misleading term if there is always kept in mind the fact that the term does not in any way indicate intrinsically any impropriety of conduct whatever, but frequently indicates the commendable, industrious, wise, diligent spirit that has put into that town something that nobody else has had the disposition or energy to put into that town. That is not monopolizing.

If, after the pioneer in the town has built that theatre, somebody else buys it from him, that does not monopolize that town. In this respect it makes no difference whether the man who owned the theatre wanted to sell it and got an excessive price, or a fair price, or too small a price. It [fol. 3977] still is not a monopolization. There was the selling operator of that theatre before. He was not monopolizing and the man who took his place by purchase is no more monopolizing than the seller was. The scope of enterprise is not lessened in any way by the transaction.

After an investigation has been made by your Honor into the various acquisitions that have been shown here as made by the defendants, so far as the Sherman Anti-Trust Act is concerned, it will be immaterial whether they were fair and good bargains for the seller or were not. The effect upon the industry is just the same, the substitution of one owner and operator for another owner and operator.

In the particular case there are two reasons why that does not constitute a violation of Section 2 of the Sherman Anti-Trust Act, one, that it does not constitute monopolizing and the other that it does not constitute monopolizing of interstate commerce. I am not speaking now of the fact [fol. 3978] that the transaction takes place locally alone. There are many things which constitute a restraint of interstate commerce that take place locally. The parties involved may never leave the State.

Let me put an unimaginable case. If one man in New York meets another man in New York and is successful in buying the wheat production of the Western fields of a given season, so that he has them all, it is not the fact that he did not move out of his tracks in New York that is the determining factor. It is a fact that his act has had the

direct and substantial effect of monopolizing the interstate wheat commerce of the country.

Here in this case we are dealing with something entirely different. An exhibitor of motion pictures is not in the business of interstate commerce. A distributor of motion pictures to exhibitors frequently is engaged in the business of interstate commerce. An exhibitor of motion pictures is no more engaged in interstate commerce than the man [fol. 3979] who runs the village grocery store in the same town. It makes no difference that he may get his bananas from the American Fruit Company, his sugar from the American Sugar Refining Company, his provision in beef and otherwise from the packers at a distance. His business is a local business. Nothing could be more definitely local. A man who runs a theatre locally is no more engaged in the business of interstate commerce than a man who runs a ball park or a skating rink. It has nothing to do with interstate commerce.

Now, the reason that the Sherman Anti-Trust Act was limited at the time it was passed to interstate and foreign commerce was because that was the only thing that was within the province of Congress to legislate upon. Congress might not, under the Constitution, take steps to prevent unreasonable restraints of local competition, unreasonable restraints of local trade. This matter is fundamental in the case now on trial. It distinguishes this case from the [fol. 3980] many that have got into the books, foreign, pretty much all of them. The distributors engaged in interstate commerce have been the parties sued. Their conduct, if it was proven to be in restraint of commerce, was easily in restraint of interstate commerce. Such is not the case with the exhibitor.

Repeatedly the Court has said that to come within the prohibitions of this Act there must be a substantial and direct restraint upon interstate commerce and the interstate is the important word that removes this from the domain of government of State to the domain of the United States.

We contend that on the evidence thus far introduced, if there has been any restraint of commerce, if there has been any monopolization of commerce, it has not been a restraint upon interstate commerce or a monopolization of interstate commerce. Of course, I am not at this time bringing to your Honor's attention the decisions which support the

[fol. 3981] contention which I am presenting. I believe that every decision, certainly of the Supreme Court of the United States and of the courts of appeals of the several circuits that have dealt with this problem, are in accord on it and that there is nothing left for debate upon that subject. The cases are briefly referred to in the supplemental pre-trial, white-covered brief for the defendants, filed September 26, 1944, and more extensively covered, except as to the later decisions that did not exist at the time, in Mr. McKay's memorandum of law filed with your Honor in 1942.

The next step in bringing clarity into this case is to lay before you in one place this motion picture industry as it has developed, with its features, many of them not common to the industries that we knew forty and more years ago, and that we know mostly now. It is an entirely different field of operation, in many respects, than is occupied by any other industry.

[fol. 3982] Now, as it must necessarily take a little time for this, if agreeable with your Honor, I would rather not break it in the middle, if we could wait for that until tomorrow morning, unless your Honor prefers to go on.

The Court: No, it is after half-past 4. I would like to adjourn at this time, unless you want to go on with it.

We will recess until tomorrow morning at 10 o'clock.

(Whereupon a recess was taken until Tuesday, October 31st, 1944, at 10 o'clock A. M.)

[fol. 3983] (The following exhibits were received in evidence as Plaintiff's Exhibits:

Ex. No.	Description
190.	Letter dated Dec. 8, 1936, Grady to Merrenbloom.
216.	Letter, Nov. 8, 1938, Lynch to Grady.
218.	Letter, Nov. 17, 1938, Sussman to Grady.
273.	Paramount Cancellation of Contract, March 4, 1940.
356.	Letter, May 8, 1934, Lynch to Dave Miller.
363.	Universal contract, Gaby & Cohen, Feb. 28, 1935.
366.	Letter July 16, 1935, Sauber to A. Schimel.
530.	RKO, Change of Contract, Dec. 11, 1935, Corning.
393.	Universal Cancellation or Alteration of Contract, Dec. 15, 1938, re Mr. Scott in Corbin.
367.	Letter Lynch to Sauber, Sept. 11, 1935.

Ex. No. Description.

368. Letter Universal (Sauber) to Lynch, Sept. 14, 1935.

539. Inter-office communication Kramer to Mr. Smith, Dated Sept. 10, 1932.

259. Letter, Sept. 30, 1937 Opera House to Paramount.

597. Inter-office communication Sachson to Dunbar, dated Dec. 9, 1940.

598. Letter, Dec. 13, 1940, to Sachson, unsigned.

599. Inter-office communication Dec. 20, 1940 from Sachson to Dunbar.

600. Copy of letter Dec. 23, 1940 to Sachson unsigned.

601. Letter Dec. 27, 1940, Sachson to Lynch.

[fol. 3984] 76. Letter Jan. 14, 1936 from Lazar to Shelby Globe.

662. Columbia, Alteration of contract, approved Dec. 17, 1935, Southern Theatre, Bucyrus.

526. Letter Jan. 8, 1935, RKO to E. L. McEvoy.

527. Letter Jan. 10, 1935, McEvoy to Dixon.

528. Letter Feb. 18, 1935 Dixon to McEvoy.

300. Inter-office letter from Bykowski, Buffalo to S. Lehman, dated Sept. 16, 1937.

307. Inter-office letter from Lazarus, United Artists, to M. Stahl, Dated Dec. 7, 1938.

310. Letter, Dec. 15, 1939 from Frances Turner to Edward Mullen.

318. Letter, Dec. 16, 1940 from Lynch to Lehman.

319. Letter, Dec. 18, 1940 from Lehman to Lynch.

397. Letter, June 8, 1939 from Kreisler, Universal, to F. J. A. McCarthy.

518. Inter-office letter from Halligan to McEvoy, RKO.

425. Letter, Oct. 21, 1933 from Lynch to Jack Flynn, Metro-Goldwyn-Mayer.

426. Letter, Jan. 4, 1934 from Pielow to J. E. Flynn.

488. Letter May 15, 1939 from Maw to O'Shea.

387. Letter, Jan. 28, 1938 from Sauber to Lynch.

381. Letter, June 22, 1937 from F. J. A. McCarthy to [fol. 3985] Krieger.

374. Letter, Oct. 28, 1936 from P. T. Dana to Paul Krieger.

390. Letter dated Feb. 15, 1938 from L. Goldstein to Nate Sauber.

412. Letter dated Sept. 10, 1932 from Lynch to Flynn.

413. Letter, Sept. 12, 1932 from Flynn to Lynch.

384. Letter, Jan. 4, 1938 from Dave Miller to Lynch.

Ex. No. Description

385. Inter-office communication, Jan. 21, 1938 from Miller to F. J. A. McCarthy.

386. Letter, Jan. 27, 1938 from McCarthy to Lynch.

388. Letter, Feb. 1, 1938 from W. B. Kraemer to McCarthy.

361. Letter Nov. 28, 1934 from Dave Miller to Myer Schine.

338. Letter, October 24, 1932 from Lynch to Jack Sichelman (Fox).

163. Inter-office communication, Sept. 13, 1932 from Schmertz to Sichelman.

165. Inter-office communication, Sept. 24, 1932 from Schmertz to Sichelman.

166. Letter, Sept. 27, 1932 from Sichelman to Schmertz.

167. Inter-office communication, Oct. 3, 1932 from Schmertz to Sichelman.

168. Inter-office communication, Oct. 13, 1932 from [fol. 3986] Schmertz to Sichelman.

169. Letter, Oct. 21, 1932 from Sichelman to Schmertz.

170. Letter, Oct. 21, 1932 from Sichelman to Schine.

171. Letter, Oct. 24, 1932 from Lynch to Sichelman.

172. Letter, Oct. 24, 1932 from Lynch to Schmertz.

243. Telegram, Sept. 10, 1932 from Lynch to Paramount Publix Corp.

494. Inter-office communication Nov. 7, 1935 from Pielow to Flynn.

444. Inter-office communication, June 15, 1936 from O'Shea to Flynn.

497. Inter-office communication from Pielow to Flynn, dated Nov. 30, 1936.

430. Inter-office communication Aug. 1, 1935 from Pielow to Flynn.

554. Inter-office communication Feb. 26, 1935 from R. S. Smith to A. W. Smith, Jr.

546. Inter-office communication June 25, 1934 from R. S. Smith to A. W. Smith, Jr.

549. Inter-office communication Aug. 31, 1934 from R. S. Smith to R. Mochrie.

574. Contract—recommendation, Boumansour, Malone, Plaza dated June 22, 1937.

173. Inter-office communication Dec. 28, 1932 from Sydney Samson to J. Sichelman.

Ex. No. Description

[fol. 3987] 282. Inter-office communication Feb. 21, 1934 from Lazarus to J. Kaplan (United Artists).

283. United Artists Contract Change Report, Feb. 23, 1934, Hi-Art, Lockport.

288. Inter-office communication from Jack Kaplan to S. W. McGrath, dated May 7, 1935.

321. Letter Jan. 21, 1937 from United to Charles Stern.

322. Letter Feb. 8, 1937 from Charles Stern to A. M. Goodman.

323. Letter March 8, 1937, United, from Bert M. Stearn to Charles Stern.

226. Letter, June 26, 1939; Sussman to Samson.

227. Inter-office communication, June 27, 1939, from Samson to Sussman.

228. Letter June 27, 1939, Sussman to Grassgreen.

229. Letter, June 30, 1939, Grassgreen to Sussman.

230. Letter, June 30, 1939, Sussman to Sydney Samson.

236. Letter, Feb. 13, 1940 from Sussman to Bloom.

292. Inter-office communication Feb. 5, 1936 from S. W. McGrath to Nat Beier.

369. Letter Sept. 23, 1935 from Dana to Dave Miller.

370. Letter, Sept. 23, 1935, to Frank McCarthy, re Buffalo, Ohio and Albany territory.

[fol. 3988] 559. Inter-office communication Dec. 27, 1935 from M. A. Mooney, Cleveland to R. Mochrie.

560. Copy of telegram March 25, 1936 from A. W. Smith to M. A. Mooney.

561. Copy of Telegram April 1, 1936 from Mochrie to M. A. Mooney.

566. Contract recommendation, Sept. 16, 1936 from M. A. Mooney re Colonial, Fostoria.

164. Inter-office communication, Sept. 19, 1932 from Samson to Sichelman.

286. Inter-office communication, Oct. 8, 1934 from Kaplan to Lazarus, United Artists.

308. Letter March 18, 1939 from Bykowski to Kraemer.

519. Letter Oct. 17, 1933 from C. R. Halligan to McEvoy, RKO.

396. Letter May 23, 1939, Universal from John Scully to F. J. A. McCarthy and letter May 19, 1939 from McCarthy to Scully.